TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted] 221

AMERICAN SMELTING AND REFINING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 8, 1921.

(28,085)

(28,085)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 728.

AMERICAN SMELTING AND REFINING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 7, 1921.

1 In the Court of Claims.

No. 34621.

AMERICAN SMELTING AND REFINING COMPANY

vs.

THE UNITED STATES.

I. *Petition.*

(Filed May 28, 1920.)

To the Honorable the Court of Claims:

The Claimant, American Smelting and Refining Company, respectfully represents:

I. The claimant is a corporation organized under the laws of the State of New Jersey, having an office for the transaction of business at No. 120 Broadway, in the City and State of New York.

II. For a long time preceding the declaration of war with Germany on the 6th day of April, 1917, the claimant company had been engaged in the production, sale and distribution of copper and other metals, and remained so engaged after the declaration of war and continuously to the present time.

III. Following the entry of the United States into the war, on the 6th day of April, 1917, the demand for copper for war purposes, already very great, was greatly enlarged, and the price of copper, until controlled by the Government, ruled materially above 23½ cents per pound.

On or about the 21st day of September, 1917, the Price-Fixing Committee of the War Industries Board recommended that
2 the trading or selling price of copper be fixed at (23½ cents) twenty-three and one-half cents a pound, f. o. b., New York; such price to remain in effect until the 1st of January, 1918. Said recommendation was, on or about the same date, approved by the President of the United States and thereby became, by virtue of the powers vested in the President by the Constitution and Laws of the United States, the trading or selling price of copper, and all subsequent contracts or orders for the delivery of copper, whether by or between the Government of the United States and private industries or between private parties, were governed thereby.

On or about the 1st day of January, 1918, a new order was made by the same authority, whereby the same price was fixed, to prevail and continue until the 1st day of June, 1918. On that date it was provisionally extended, to not later than the 15th day of August, 1918.

On the 2nd day of July, 1918, however, the price of copper, so fixed, was changed by the same authority to twenty-six cents (26 cents) a pound, f. o. b. refinery, and the price so fixed remained in force and effect from and after the 2nd day of July, 1918, to the date of the armistice, November 11, 1918, and for some time thereafter.

The action of the President of the United States in thus prescribing the selling price of copper, as aforesaid, was taken by virtue and in pursuance of law, and all producers and sellers of copper were obliged to deliver, and claimant, in particular, did deliver, any copper on the basis of the prices fixed and controlled as aforesaid.

IV. Shortly after the United States, through its proper authorities, as set forth in the next preceding paragraph, first prescribed a fixed price for copper, the copper producers of the United States, at the request of the War Industries Board, a duly constituted
3 agency of the Government, formed what was known as the "Copper Producers' Committee," with an office in New York and with a representative in Washington, which Committee, subject to the control and supervision of, and in co-operation with, the War Industries Board, distributed all orders for copper among the various copper producers in proportion to their respective outputs, and also allocated or distributed tonnages of copper available for delivery between the United States and other Governments as well as private industries, all in such manner as was best required in the public interests and as should best promote the vigorous and successful prosecution of the war. This Committee directed and prescribed that all orders for copper for the use of allied European Governments, whether under contracts or orders of any of those Governments or of the United States, should be filled through or by the claimant company, acting as a clearing house for copper producers, while all orders for copper for the use of the United States alone should be filled through another company, the United Metals Selling Company, likewise acting as a clearing or sales agency for producers. These directions and requirements continued and were followed during the entire time of active hostilities in the European War.

On the 14th day of March, 1918, the Ordnance Department of the United States Army, by its proper officers and acting under provisions of law applicable thereto, issued an order, serially numbered as "War Order P-4219-1788-A," directed to the United Metals Selling Company, a copy of which order is annexed to this petition as Exhibit "A." This order stated, by direction of the Chief of Ordnance—

"that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper—Prime
4 Lake or Electrolytic—at a price of 23½ cents net per pound, f. o. b. New York basis."

Said order also provided:

"Deliveries to extend over a period of six months, and are to be made at the rate of 5,000 metric tons per month starting with March."

According to the terms of this order, deliveries would have continued through the months of March, April, May, June, July and August, 1918.

Said United Metals Selling Company acknowledged receipt of this order on the 19th day of March, 1918 (a copy of which letter of acknowledgment is annexed to this petition, marked Exhibit "B"), stating therein that it could not accept an order at the price of 23½ cents a pound for deliveries extending beyond June 1st, 1918, to which date only the price of 23½ cents a pound has been fixed by action of the President, and, therefore, requesting that the order be corrected, so as to call for only fifteen thousand (15,000) tons for the first three months—that is, to the first day of June—and, that if desired, another order be given for the remaining fifteen thousand (15,000) tons at whatever price should be determined later by the aforesaid price-fixing authorities of the Government.

The Ordnance Department replied to this letter on the 23rd of March, 1918, stating that the order would be amended so as to call for delivery of the whole thirty thousand (30,000) metric tons on or before the first of June, 1918 (a copy of which letter is hereto annexed, marked Exhibit "C").

Thereafter the Ordnance Department of the Army, on the 25th of March, 1918, wrote another letter to the United Metals
5 Selling Company, giving directions that the copper shall be shipped in shapes specified by the French High Commission and stating how such copper should be inspected and what officers were to give directions as to shipments. A copy of said letter is hereto annexed, as Exhibit "D." Said letter (Exhibit "D") was brought to the knowledge of the claimant company at the time that it took over the fulfillment of the order and governed all productions and shipments made by the claimant company.

VI. The attention of the Copper Producers' Committee, hereinbefore referred to, was called to the fact that the copper which the Government was about to require, as set forth in the preceding paragraph was for the use of the French Government. Thereupon said Committee, with the full knowledge and approval of the officers of the Ordnance Department of the Army, directed that the order be filled by the American Smelting and Refining Company (the claimant in this case), as the proper clearing house or agency for export orders, instead of by the United Metals Selling Company, the clearing agency for domestic orders. Accordingly, on the 26th of March, 1918, the United Metals Selling Company informed the Ordnance Department that said order—P 4219-1788 A—should properly be directed to the American Smelting and Refining Company. A copy of the letter of the United Metals Selling Company, so informing the Ordnance Department, is hereto annexed, as Exhibit "E."

Thereupon, on the 28th day of March, 1918, the Ordnance Department wrote a letter to the claimant company, stating, by direction of the Chief of Ordnance—

"that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper at a price
6 of 23½ cents per pound net f. o. b. New York basis. Deliveries are to be completed on or before June 1st, 1918."

A copy of this letter is hereto annexed, Marked Exhibit "F."

Immediately upon receipt of this letter or order and as soon as shipping instructions could be obtained, together with directions as to ships, as required by the order, the claimant company, knowing said order to be legally obligatory upon it under the laws of the United States, proceeded with all possible dispatch to obtain and furnish copper thereby called for.

By the 10th day of April there had been furnished and delivered a total of about two thousand five hundred (2,500) metric tons, and arrangements had been made for furnishing and delivering more than 5,000 tons additional in that month. No payment had up to that time been made for the tonnage delivered, for which nearly one million three hundred thousand dollars ($1,300,000) was due and unpaid by the United States, and for which the producers of copper, for whom and in whose behalf, as well as for itself, the claimant company was acting, were pressing the claimant company to obtain payment from the Government and to account therefor to said producers respectively. Thereupon, on the 10th of April 1918, the Copper Producers' Committee, by its officially authorized representative in Washington, wrote a letter to the claimant company, based upon information obtained by said representative from the Ordnance Department of the United States Army, informing the claimant company that there would have to be a formal acceptance of the letter of the Ordnance Department before any payments could be made. A copy of said letter of April 10th, 1918, is annexed to this petition marked Exhibit "G."

7 To this letter the claimant company, on the 11th day of April, 1918, made a response to the representative of the Copper Producers' Committee, a copy of which letter is hereto annexed, marked Exhibit "H," and which inclosed a letter of acceptance, also dated April 11, 1918, to the Ordnance Department of the Army, a copy of which is hereto annexed, marked Exhibit "I."

Within said month of April the claimant company, by its Vice-President, had an interview with Mr. Pope Yeatman, Chairman of the Non-Ferrous Metals Section of the War Industries Board, in which he adopted and reiterated the protest originally made by the United Metals Selling Company, as contained in Exhibit "B" to this petition, dated March 19, 1918, and objected to having an order forced upon the producers for the delivery of 30,000 tons of copper by the first of June, when it was known that not one-half of that quantity could be delivered by that date, except by the displacement of other orders of equal and greater importance, and to thus being forced to accept the price of 23½ cents a pound for a large tonnage after the period to which that price was limited by presidential order had expired.

VII. The copper required by the United States under the orders hereinbefore set forth was desired for shipments to France, for use by the French Government, and was in part required to be in sizes and dimensions conforming to French measurements and usage, and not in sizes and dimensions customarily required or used in the United States. The claimant was directed, in the order given to it,

to consult the French High Commission and to obtain specific instructions from said Commission as to the sizes and dimensions required. It was also necessary in every case that the claimant
8 company be furnished by the Ordnance Department of the United States Army with independent specification orders, confirming the specifications given by the French High Commission, and also with shipping instructions in detail, without which such copper could not be received or transported by the steamship companies, or by the railroads over whose lines it was to reach the several ports whence it was to be shipped to France.

The claimant company proceeded to furnish, and did furnish and deliver as promptly as possible upon receipt of specifications and shipping instructions, all the copper for which such specifications and shipping instructions were furnished by the French High Commission and by the United States. On or before June 1, 1918, the claimant had furnished and shipped a total of 23,314,085 pounds (10,575 metric tons), which was all the copper that could by possibility have been produced and shipped by that date on the specification orders and shipping instructions then received.

No portion of the 14,000 metric tons for which a specification order dated May 20, 1918, had been received could by any degree of effort or diligence have been produced and shipped by that date, having previously been demanded for delivery to mills in this country supplying munitions for the United States Government.

On the 27th day of June, 1918, the claimant company wrote a letter to Colonel Samuel McRoberts, Ordnance Department of the United States Army, stating its position to be that it was entitled to full settlement on all copper delivered prior to June 1, at twenty-three and one-half cents (23½ cents), and thereafter to such price as might be fixed by the Price-Fixing Committee and the producers, effective upon the date so fixed. A copy of said letter is hereto annexed, marked Exhibit "J."

9 On or before July 2, 1918, the claimant had furnished and shipped a further total of 19,916,895 pounds (9,034 metric tons), which was all the copper that could by possibility have been shipped by that time on the specification orders and shipping instructions then received (with the exception of 2,405,008 pounds (1,091 metric tons), which was not shipped until after that date, for good and sufficient reasons arising in part from lack of steamer space and in part because of the requirements of other orders for the benefit of the Government, but in respect to which no claim is made, or has been made. No portion of the remaining 20,500,620 pounds (9,299 metric tons) could by any degree of effort or diligence have been produced or delivered prior to July 2, 1918; but all of such remaining quantity was produced and delivered as promptly as possible at various times after said last mentioned date.

The above mentioned letter of June 27, 1918, was answered on the 1st day of July, 1918, by a letter of the Ordnance Department, stating that the Department is entitled to the delivery of the entire quantity of said copper at 23½ cents a pound. A copy of said letter is hereunto annexed, marked Exhibit "K."

VIII. Thereafter, on the 2nd day of July, 1918, the Price-Fixing Committee of the War Industries Board, in pursuance of authority lawfully vested in it and with the approval of the President of the United States, fixed the price of copper at twenty-six cents (26 cents) a pound, effective on and after said 2nd day of July.

On or about the same date, all questions then at issue or that might arise between the producers of copper and the United States, as to the price to be paid for copper, under existing contracts
10 or orders, were referred by the Price-Fixing Committee of the War Industries Board to Mr. Pope Yeatman, Chairman, as aforesaid, of the Non-Ferrous Metals Section of the War Industries Board, and said Pope Yeatman was thereby authorized to act as umpire of such controversies. A hearing was thereupon held by said Pope Yeatman, at which the officers of the Ordnance Department of the Army and the officers of the claimant company respectively, appeared and stated fully their grounds for claiming—respectively—the officers of the Government that the price of 23½ cents should continue to prevail on deliveries effected after the 2nd day of July, 1918, and the officers of the claimant company that such deliveries should be at the price of 26 cents a pound.

Along with the question arising on the order to the claimant company was submitted to said Pope Yeatman, the question of the right of the United Metals Selling Company, hereinbefore referred to and representing the same producers of copper as the claimant company, but upon orders whereby such copper was to be furnished to the United States for its own use and affecting about two hundred millions of pounds of copper. Said Pope Yeatman, shortly after the 2nd day of July, 1918, after full hearings, decided, as to the order to the United Metals Selling Company for 200,000,000 pounds, that so much of said copper as was either delivered before the 2nd day of July, 1918, or as might, by the exercise of reasonable diligence on the part of said United Metals Selling Company or of the producers represented, have been delivered prior to said 2nd day of July, 1918, should be paid for at 23½ cents a pound, but that such as neither was, nor could have been, delivered by said 2nd day of July, 1918, and was delivered afterwards, should be paid for at the rate of twenty-six cents (26 cents) per pound. Said orders for 200,000,000 pounds were accordingly settled and paid for on the principle so de-
11 cided by said Yeatman. After the hearing had been closed, however, but before any formal decision could be rendered by him on the order to the claimant company, involved in the present case, the Ordnance Department of the Army, knowing of the rule and principle announced by him and with a view to prevent its being applied to the transaction herein involved, undertook to withdraw the controversy from his consideration, upon the ground or pretence that there was a complete and perfect contract between the claimant company and the United States for delivery of the entire amount of copper at 23½ cents a pound and that, therefore, there was no ground for arbitrating anything. A copy of the letter of the Ordnance Department, undertaking so to withdraw the controversy from the consideration of said Pope Yeatman, is annexed hereto as Exhibit "L."

A copy of said letter was transmitted to the claimant company by said Pope Yeatman by a letter of August 16, 1918, a copy of which is hereto annexed, Marked Exhibit "M."

On the same date the claimant company wrote a letter to the Procurement Division, Ordnance Office, War Department, stating that it was sending to the disbursing officer in New York various invoices covering shipments of copper made since July 2d, 1918, at 23½ cents per pound, but protesting against the payment of any less than 26 cents per pound, a copy of which letter is hereto annexed, marked Exhibit "N."

On the 11th day of September, 1918, the claimant company wrote to said Pope Yeatman, protesting against the action of the Ordnance Department, a copy of which letter is hereto annexed, marked Exhibit "O."

12 IX. Meanwhile from time to time and as fast as possible after specifications were furnished by the French High Commission and the Ordnance Department and shipping instructions could be received from the proper authorities of the Ordnance Department of the United States, the entire remaining quantity of copper covered by the order, to wit, twenty million five hundred thousand six hundred and twenty (20,500,620) pounds, were delivered by the claimant company, all after the 2nd day of July, 1918.

X. On or about the 10th day of June, 1918, the Ordnance Department submitted to the claimant company a form of contract, covering the transactions hereinbefore set forth, with the request that said contract be executed, with which request the claimant company declined for a long time to comply.

On the 7th day of October, 1918, at which time a large amount of money was due the claimant and was being withheld from it because the contract was not signed, the Ordnance Department wrote the claimant company a letter, a copy of which is hereunto annexed, marked Exhibit "P," requesting that the contract be returned or that the claimant arrange with the Procurement Division for the issuance of a procurement order which should be sufficient to support payments until the formal contract should be executed. In response to this letter, on the 8th day of October, 1918, claimant wrote the Ordnance Department, transmitting copy of the letter or order of March 28th, 1918, hereinbefore referred to and annexed to this petition as Exhibit "E" (a copy of which letter is hereto annexed, marked Exhibit "Q"). In response to this letter the claimant was informed, by a letter of the Finance Division of the Ordnance
13 Department, dated October 14th, 1918, that said letter of March 28th was not a procurement order at all, and transmitted to the claimant a communication from the Ordnance Department at Washington, stating that the Legal Section, Procurement Division, advised that office that there was no record of a procurement order and that the contract had not been signed. Said communication from the Ordnance Department at Washington, dated October 4th, 1918, is hereto annexed, marked Exhibit "R," and said letter from the Finance Division of the Ordnance Depart-

ment, dated October 14th, 1918, is hereto annexed, marked Exhibit "S."

This letter was answered by the claimant company under date of October 16th, 1918, addressed to the Ordnance Department at Washington, a copy of said letter being hereto annexed, marked Exhibit "T." This letter was replied to on the 30th day of October, 1918, by the Ordnance Department by letter addressed to the claimant company, a copy of which letter is hereto annexed, marked Exhibit "U."

XI. Thereafter the United States Government, by its authorities, continually refused to make any payments until the claimant should execute a contract in due form which would be sufficient to support payments, and transmitted to the claimant company a form of contract, purporting to have been signed and executed on the 28th day of March, 1918, but which was not, in fact, executed on that date and which the claimant, long after the delivery of all the copper covered by the original order, executed and signed under protest and with express reservations. A copy of said contract or instrument in the form of a contract, and purporting to be dated March 28th, 1918, was signed by the Company on or about the 13th day of January, 1919, and a copy thereof is hereunto annexed,
14 Marked Exhibit "V." A copy of the protest and reservations, dated January 13, 1919, is hereto annexed, marked Exhibit "W." The receipt of this contract was acknowledged by letter of the Ordnance Department, dated January 14th, 1919, a copy of which is hereto annexed, marked Exhibit "X." The claimant company, by letter of January 17th, 1919 (a copy of which is hereto annexed, marked Exhibit "Y"), wrote the Ordnance Department of the Army, requesting that due note be taken of the fact that, contemporaneously with the delivery on behalf of the Company of the executed contract, there was delivered to the contracting officer of the Department the company's letter, dated January 13th, 1919, stating its protests and reservations. This letter was answered by the Ordnance Department of the Army, under date of January 22nd, 1919, a copy of which is hereto annexed, marked Exhibit "Z," acknowledging the receipt and filing of the claimant company's protest.

XII. Thereafter the claimant company was paid at the rate of 23½ cents a pound for all the balance of the copper for which it had not been previously paid.

XIII. By the National Defense Act of June 3, 1916 (Chapter 134, Sec. 120, 39 Stat., 213), compliance with all orders for products or material is made obligatory. The refusal to comply therewith is made a criminal offense, punishable by fine and imprisonment and the seizure of the plant of the manufacturer of such products or material, and it is provided by said section that the compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for it products or material shall be fair and just. The price of twenty-six (26) cents a pound was,

from and after the 2nd day of July, 1918, the fair and just
15 compensation for copper and was so fixed by competent authority, as aforesaid.

XIV. Under the provisions of law and executive order, and particularly of the act of March 2, 1919 (Chapter 94, Section 1, 40 Stat., 1272), there was constituted within the War Department a Board of Contract Adjustment, for the consideration and settlement of all war contracts, orders, or agreements, whether formal or informal, and to said Board claimant submitted its claim. Said claim was, by said Board, disallowed, whereupon the claimant appealed to the Secretary of War form said disallowance. The decision of said Board was, by said Secretary, affirmed.

XV. By Section 2 of the same Act, jurisdiction is given to this court to find and award fair and just compensation due on any such war contracts, orders or agreements, whether formal or informal, and by Section 145 of the Judicial Code of March 3, 1911 (Chapter 231, 36 Stat., 1136), this court also has jurisdiction of all claims founded upon any contract, expressed or implied, with the Government of the United States, as well as of all claims founded upon the Constitution of the United States, and claimant relies upon the Fifth Amendment to the Constitution of the United States, providing that private property shall not be taken for public use without just compensation.

XVI. The claimant corporation and its officers are citizens of the United States and have at all times borne true faith and allegiance to the Government of the United States. The claimant is the owner of this claim and no assignment or transfer thereof has been made otherwise than as herein stated.

16 XVII. The claimant prays judgment as follows:

20,500,620 pounds of copper at 26 cents a pound...	\$5,330,161.20
Less payments received at 23½ cents per pound...	4,817,645.70
Balance	\$512,515.50

KING & KING,
Attorneys for Claimant.

GEORGE A. KING,
CHARLES EARL,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

Joseph Clendenin, being duly sworn, deposes and says: I am Vice-President of American Smelting and Refining Company, claimant herein; I have read the above petition and the facts therein stated are true, to the best of my knowledge and belief.

JOSEPH CLENDENIN.

Subscribed and sworn to before me this 10th day of May, 1920.

S. KALESCHER,
Notary Public.

Exhibits A to Z inclusive, at end of amended petition, post, p. 45.

17 II. *Demurrer.*

(Filed July 23, 1920.)

The United States, by its Attorney General, demurs to the petition filed herein May 28, 1920, on the ground that the same does not state facts sufficient in law to constitute a cause of action.

Dated July 23, 1920.

FRANK DAVIS, Jr.,
Assistant Attorney General.

J. ROBERT ANDERSON,
CROWLEY WENTWORTH,
Special Assistants to the Attorney General.

18 III. *Argument and Submission on Demurrer.*

October 11, 1920.

Argued and submitted on demurrer by Mr. George A. King for the claimant and Messrs. Crowley Wentworth & J. Robt. Anderson for the defendants.

19 IV. *Opinion.*

(Filed October 25, 1920.)

Court of Claims of the United States.

No. 34621.

American Smelting and Refining Company

v.

The United States.

Hay, *Judge,* delivered the opinion of the court:

This is a suit brought by the American Smelting and Refining Company against the United States to recover the sum of $512,-515.50. The United States has demurred to the petition.

The petition alleges that the plaintiff is a corporation organized under the laws of New Jersey, having an office in the city of New York, and that it and its officers are citizens of the United States and have at all times borne true faith and allegiance to the Government of the United States; and that it owns the claim sued on, and that no assignment or transfer of the same has been made.

The petition further alleges that for a long time preceding the declaration of war with Germany on the 6th day of April, 1917, the plaintiff company had been engaged in the production, sale, and distribution of copper, and remained so engaged after the declaration of war and up to the present time; that on the 21st day of September, 1917, the President of the United States, by virtue of the authority vested in him by the Constitution and laws of the United States, fixed the price of copper at twenty-three and one-half cents a pound, f. o. b. New York; such price to remain in effect until the first day of January, 1918. On the first day of January, 1918, the President of the United States entered an order fixing the same price for copper until the first day of June, 1918. On the second day of July, 1918, the price of copper was fixed by the President at 26 cents per pound, f. o. b. refinery, and that price remained so fixed until the date of the armistice, November 11, 1918.

The petition further alleges that shortly after the price of copper was fixed by the President the copper producers of the country, at the request of the War Industries Board, formed the Copper Producers' Committee, with an office both in New York and Washington, which committee, subject to the control of and in cooperation with the War Industries Board, distributed all orders for copper among the copper producers. This committee directed that all orders for copper for the use of allied Governments should be filled through or by the plaintiff, and that all orders for copper for the
20 United States should be filled through or by the United Metals Selling Company.

The petition further alleges that the Ordnance Department of the United States Army sent to the United Metals Selling Company the following, dated March 14, 1918: "That the Procurement Division is prepared to procure from you 30,000 metric tons (163,138,000 pounds) of copper, Prime Lake or Electrolytic, at a price of 23½ cents net per pound, f. o. b. New York basis." This letter also provided for deliveries to extend over a period of six months, 5,000 metric tons per month beginning with March. The United Metals Selling Company replied on March 19, 1918, that it could not accept the order at the price of 23½ cents per pound for deliveries extending beyond June 1, 1918, to which date only the price of 23½ cents per pound was fixed, and requested a change in the order.

The Ordnance Department on March 23, 1918, replied to the foregoing letter, amending the former letter so as to call for delivery of 30,000 metric tons of copper to be delivered on or before June 1, 1918, and on March 25, 1918, the Ordnance Department advised the United Metals Selling Company that it wished the copper shipped to France.

The Copper Producers' Committee directed that the copper so ordered by the Ordnance Department should be filled by the plaintiff, and on March 28, 1918, the Ordnance Department wrote a letter to the plaintiff as follows: "That the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper at a price of 23½ cents per pound net, f. o. b. New York basis. Deliveries are to be completed on or before June 1st, 1918." After

some intermediate correspondence the plaintiff wrote the following letter to the Ordnance Department, dated April 11, 1918: "We have your favor March 28, under the above reference number, and take pleasure in accepting your letter as above, pending issuance of formal contract, which we hope to receive in the near future."

The petition further alleges that the plaintiff furnished and delivered as promptly as possible upon receipt of specifications and shipping instructions all the copper for which such specifications and shipping instructions were furnished by the French High Commission and the United States, and on or before June 1, 1918, had furnished and shipped a total of 10,575 metric tons, which the petition alleges was all the copper that could by possibility have been produced and shipped by that date on the specification orders and shipping instructions then received. It also appears that the plaintiff on May 2, 1918, requested to be allowed to continue deliveries beyond June 1, 1918.

The petition further alleges that on June 27, 1918, the plaintiff advised the Ordnance Department that its position was that it was entitled to full settlement on all copper delivered prior to June 1, at 23½ cents a pound, and thereafter to such price as might be fixed by the Price Fixing Committee and the producers, effective upon the date so fixed. This letter was answered by the Ordnance Department July 1, 1918, and the plaintiff was advised that the department was entitled to the delivery of the entire quantity of copper at 23½ cents a pound.

21 On or before July 2, 1918, the plaintiff had furnished and shipped 20,701 metric tons of copper. The petition alleges that no portion of the remaining 9,299 metric tons (20,500,620 pounds) of copper could by any degree of effort or diligence have been produced or delivered prior to July 2, 1918, but the remaining quantity was produced and delivered after July 2, 1918.

On July 2, 1918, the President fixed the price of copper at 26 cents a pound, effective on that day. About the same date all questions then at issue between the producers of copper and the United States as to the price of copper to be paid under existing contracts or orders were referred to Mr. Pope Yeatman, who was authorized to act as umpire of such controversies. A hearing was held by said Pope Yeatman, at which the officers of the Ordnance Department and the officers of the plaintiff appeared. After the hearing had been closed, but before any decision had been rendered, the officers of the Ordnance Department withdrew the controversy from Mr. Pope Yeatman on the ground that there was a complete and perfect contract between the plaintiff and the United States.

On August 16, 1918, the plaintiff wrote a letter to the Ordnance Department stating that it was sending to the disbursing officer in New York invoices covering shipments of copper made since July 2, 1918, at 23½ cents a pound, but protesting against the payment of any less than 26 cents a pound. And the plaintiff also protested to Pope Yeatman against the action of the Ordnance Department.

It is further alleged that the Ordnance Department submitted to the plaintiff a form of contract covering the transactions above men-

tioned, but it was not until the 13th day of January, 1919, that the plaintiff signed the contract, which was dated March 28, 1918. The Government refused to pay the amount of money due the plaintiff until the formal contract was signed. Considerable correspondence was had between the parties between the 10th of June, 1918, and January 13, 1919, all of which correspondence appears in Exhibits P, Q, R, S, T, and U, filed with petition of the plaintiff. When the plaintiff signed the contract it filed therewith a letter, in which it protested that it was entitled to receive 26 cents a pound for all copper furnished by it after July 2, 1918, and it protested against the action of the Ordnance Department in refusing to pay 26 cents a pound for the copper so furnished, and reserved the right to take such action as it might be advised was necessary to protect its alleged rights and interests. After signing said contract the plaintiff was paid for the copper furnished by it since July 1, 1918, at the rate of 23½ cents a pound, which amounted to the sum of $4,817,-645.70, which was $512,515.50 less than it claims should have been paid. The plaintiff under the provisions of the act of March 2, 1919, submitted its claim to the Board of Contract Adjustment. This board disallowed the claim, and its decisions was approved by the Secretary of War.

Upon the foregoing facts the plaintiff claims that it is entitled to judgment against the defendants in the sum of $512,515.50 and relies upon the fifth amendment to the Constitution and section 120 of the act of June 3, 1916 (39 Stat., 213).

The defendants insist that the procurement order of March 28, 1918, and the plaintiff's acceptance thereof constitute a contract. If this construction is correct, then the plaintiff can not rely upon
22 section 120 of the act of June 3, 1916, nor upon the provisions of the fifth amendment to the Constitution.

It appears from the allegations of the petition that the plaintiff, upon demanding payment for the copper which it was delivering, was advised that no payment could be made by the Government until the plaintiff accepted in writing the proposal made to it by the Government. Whereupon the plaintiff on April 11, 1918, accepted the proposal of the Government to furnish and deliver 30,000 metric tons of copper at 23½ cents per pound on or before June 1, 1918. Had the procurement order of the Government been made in pursuance of the provisions of section 120 of the act of June 3, 1916, no acceptance of said order or proposal would have been necessary, nor would the Government have demanded such acceptance before making payment. Where one party makes an offer to another by letter, and the party to whom the letter is addressed prepares and mails his answer accepting the proposal, a contract is made between the parties, and is binding upon them. Adams v. United States, 1 C. Cls., 192-194. The letter written by the Ordnance Department to the plaintiff was a proposal that the plaintiff should furnish and deliver a certain amount of copper at a certain price within a certain time; the acceptance of that proposal in writing by the plaintiff completed the transaction, and the proposal and acceptance together constituted a contract between the parties, and from the instant of the

acceptance of the proposal there was a full and distinct accord between them. The plaintiff's protests and reservations made when it signed the formal contract, long after the contract was completed, are of no effect. Nor could the plaintiff raise the price of the article which it was furnishing at agreed prices by complaining that the price of the article since the contract was made had advanced, even though the advanced price was fixed by one of the parties to the contract. If the Government had fixed the price on July 2, 1918, at 20 cents instead of 26 cents a pound we do not think the Government could successfully maintain that it should pay only 20 cents when by contract it had agreed to pay 23½ cents a pound.

As we think the writings between the parties constitute a contract it is not necessary to discuss the question raised in the petition that the procurement order of March 28, 1918, was obligatory upon the plaintiff under section 120 of the act of June 3, 1916, further than to say that the so-called procurement order does not purport to be a requisition nor to have been issued under the provisions of the act referred to. Nor has the plaintiff presented a case which entitles it to recover under the provisions of the fifth amendment to the Constitution. Nothing was taken from the plaintiff; the compensation which it received was fixed by the provisions of a contract into which it voluntarily entered.

It is difficult to understand how the plaintiff can derive any benefit from the price-fixing order of July 2, 1918. Having entered into a contract to furnish and deliver a certain article at a certain price the fixing of another price upon the article by the Government does not in any way affect the particular contract of the plaintiff. Deming v. United States, 1 C. Cls., 190, 191.

For the reasons given the demurrer of the defendants to the petition of the plaintiff is sustained, and the petition is dismissed.

23 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 25th day of October, 1920, judgment was ordered to be entered as follows:

In this case the Court rendered judgment with an opinion by Judge Hay.

Upon due consideration of the premises it is ordered, adjudged and decreed that the defendants' demurrer herein be sustained, and that the claimant's petition be and it hereby is dismissed.

By THE COURT.

24 VI. *Order Setting Aside Judgment and Allowing Amended Petition to be Filed.*

(Filed November 15, 1920.)

This cause was submitted upon motion by plaintiff to set aside the final judgment entered therein on the 25th of October, 1920, dismissing the petition and the motion states that its sole object is to enable the plaintiff to file an amended petition in pursuance of Rule 30.

On consideration whereof it is ordered that the final judgment dismissing the petition in this cause be and the same is set aside and vacated and plaintiff is granted until the 1st day of December, 1920, within which time it may file an amended petition in this cause.

25 VII. *Amended Petition.*

Original Petition Filed May 28, 1920.

Amended Petition Filed November 27, 1920.

To the Honorable the Court of Claims:

The claimant, American Smelting and Refining Company, respectfully represents:

I. The claimant is a corporation organized under the laws of the State of New Jersey, having an office for the transaction of business at No. 120 Broadway, in the City and State of New York.

II. For a long time preceding the declaration of war with Germany on the 6th day of April, 1917, the claimant company had been engaged in the production, sale and distribution of copper and other metals, and remained so engaged after the declaration of war and continuously to the present time.

III. Following the entry of the United States into the war, on the 6th day of April, 1917, the demand for copper for war purposes, already very great, was greatly enlarged, and the price of copper, until controlled by the Government, ruled materially above 23½ cents per pound.

On or about the 21st day of September, 1917, the Price-Fixing Committee of the War Industries Board, said board being at
26 that time a subordinate agency of the Council of National Defense created by the act of August 29, 1916, Sec. 2 (39 Stat. 649) fixed the price of copper at 23½ cents a pound. Its action as officially announced is as follows:

"After investigation by the Federal Trade Commission as to the cost of producing copper, the President has approved an agreement made by the War Industries Board with the copper producers fixing a price of 23½ cents per pound, f. o. b. New York, subject to revision after four months."

It was also officially announced by said War Industries Board at the same time:

"The principal copper producers throughout the country have evinced an admirable spirit, and for weeks have promptly supplied every request of the Government for copper without awaiting decision as to price and agreeing to accept the price which the board should ultimately fix. The proper departments of the Government

will be asked to take over the mines and plants of any producers who fail to conform to the arrangement and price, if any such there should be."

The price so fixed thereby became by virtue of the powers vested in the President by the Constitution and laws of the United States, the trading or selling price of copper, and all subsequent contracts or orders for the delivery of copper, whether by or between the government of the United States and private industries or between private parties were governed thereby.

On or about the 1st day of January, 1918, a new order was made by the same authority, whereby the same price was fixed, to prevail and continue until the 1st day of June, 1918.

On the 4th day of March, 1918, the President by letter to
27 Bernard M. Baruch, Chairman of said War Industries Board, conferred independent authority upon said Board, and provided that the duties of said Board should include among others "advice to the several purchasing agencies of the Government with regard to the price to be paid." He further stated: "The ultimate decision of all questions excepting the determination of price should rest always with the Chairman." "In the determination of prices the Chairman should be governed by the advice of a committee consisting, besides himself, of the members of the Board immediately charged with the study of raw materials and of manufactured products," etc.

On the 28th day of May, 1918, the President by formal executive order provided: "I hereby establish the War Industries Board as a separate administrative agency to act for me and under my direction." He at the same time, by said order specifically confirmed and continued in full force and effect the letter of March 4, 1918, to Bernard M. Baruch, Chairman of the War Industries Board hereinbefore referred to.

On the 2d day of July, 1918, the price of copper was again fixed by order of the War Industries Board, approved by the President, by the following order officially announced:

"The War Industries Board authorizes the following: Subject to the approval of the President, the price-fixing committee of the War Industries Board, in conference with representatives of the industry, today (July 2) fixed the price of copper at 26 cents per pound, an advance from 23½ cents, the price formerly fixed."

The price so fixed remained in force and effect from and after the 2d day of July, 1918, to the date of the armistice, November 11, 1918, and for some time thereafter.

28 The action of the President of the United States in thus prescribing the selling price of copper, as aforesaid, was taken by virtue and in pursuance of law, and all producers and sellers of copper were obliged to deliver, and claimant, in particular, did deliver, any copper on the basis of the prices fixed and controlled as aforesaid.

IV. Shortly after the United States, through its proper authorities, as set forth in the next preceding paragraph, first prescribed a fixed price for copper, the copper producers of the United States, at the request of the War Industries Board, a duly constituted agency of the Government, formed what was known as the "Copper Producers' Committee," with an office in New York and with a representative in Washington, which Committee, subject to the control and supervision of, and in co-operation with, the War Industries Board, distributed all orders for copper among the various copper producers in proportion to their respective outputs, and also allocated or distributed tonnages of copper available for delivery between the United States and other Governments as well as private industries, all in such manner as was best required in the public interests and as should best promote the vigorous and successful prosecution of the war. This Committee directed and prescribed that all orders for copper for the use of allied European governments, whether under contract or orders of any of those Governments or of the United States, should be filled through or by the claimant company, acting as a clearing house for copper producers, while all orders for copper for the use of the United States alone should be filled through another company, the United Metals Selling Company, likewise acting as a clearing or sales agency for producers.
These directions and requirements continued and were fol-
29 lowed during the entire time of active hostilities in the
European War.

V. On the 14th day of March, 1918, the Ordnance Department of the United States Army, by its proper officers and acting under provisions of law applicable thereto, and particularly, under the provisions of Sec. 120 of an Act for making further and more effectual provision for the national defense, and for other purposes, approved June 3, 1916 (Chapter 134, 39 Stat. 213), issued an order serially numbered as "War Order P—4219-1788—A," directed to the United Metals Selling Company, a copy of which order is annexed to this petition as Exhibit "A." This order stated, by direction of the Chief of Ordnance—

"that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper—Prime Lake or Electrolytic—at a price of 23½ cents net per pound, f. o. b. New York basis."

Said order also provided:

"Deliveries to extend over a period of six months, and are to be made at the rate of 5,000 metric tons per month starting with March."

According to the terms of this order, deliveries would have continued through the months of March, April, May, June, July and August, 1918.

Said United Metals Selling Company acknowledged receipt of this order on the 19th day of March, 1918 (a copy of which letter of acknowledgement is annexed to this petition, marked Exhibit "B"), stating therein that it could not accept an order at the price of 23½ cents a pound for deliveries extending beyond June 1st, 1918 to which date only the price of 23½ cents a pound had
30 been fixed by action of the President, and, therefore, requesting that the order be corrected so as to call for only fifteen thousand (15,000) tons for the first three months—that is, to the first day of June—and, that if desired, another order be given for the remaining fifteen thousand (15,000) tons at whatever price should be determined later by the aforesaid price-fixing authorities of the Government.

The Ordnance Department replied to this letter on the 23rd of March, 1918, stating that the order would be amended so as to call for delivery of the whole thirty thousand (30,000) metric tons on or before the first of June, 1918 (a copy of which letter is hereto annexed marked Exhibit "C").

Thereafter the Ordnance Department of the Army, on the 25th of March, 1918, wrote another letter to the United Metals Selling Company, giving directions that the copper shall be shipped in shapes specified by the French High Commission and stating how such copper should be inspected and what officers were to give directions as to shipments. A copy of said letter is hereto annexed, as Exhibit "D." Said letter (Exhibit "D") was brought to the knowledge of the claimant company at the time that it took over the fulfillment of the order and governed all productions and shipments made by the claimant company.

VI. The attention of the Copper Producers' Committee, hereinbefore referred to, was called to the fact that the copper which the Government was about to require, as set forth in the preceding paragraph, was for the use of the French Government. Thereupon said Committee, with the full knowledge and approval of the officers of the Ordnance Department of the Army, directed that the order be filled by the American Smelting and Refining Company
31 (the claimant in this case), as the proper clearing house or agency for export orders, instead of by the United Metals Selling Company, the clearing agency for domestic orders. Accordingly, on the 26th of March, 1918, the United Metals Selling Company informed the Ordnance Department that said order—P 4219-1788 A—should properly be directed to the American Smelting and Refining Company. A copy of the letter of the United Metals Selling Company, so informing the Ordance Department, is hereto annexed, as Exhibit "E."

Thereupon on the 28th day of March, 1918, the Ordnance Department, acting under provisions of law applicable thereto, and particularly under the provisions of Sec. 120 of an Act for making further and more effectual provision for the national defense, and for other purposes, approved June 3 ,1916 (Chapter 134, 39 Stat. 213), wrote a letter to the claimant company, stating, by direction of the Chief of Ordnance:

"that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper at a price of 23½ cents per pound net f. o. b. New York basis. Deliveries are to be completed on or before June 1st, 1918."

A copy of this letter is hereto annexed, marked Exhibit "F."

Immediately upon receipt of this letter or order and as soon as shipping instructions could be obtained, together with directions as to ships, as required by the order, the claimant company, knowing said order to be legally obligatory upon it under the laws of the United States, proceeded with all possible dispatch to obtain and furnish the copper thereby called for.

By the 10th day of April there had been furnished and
32 delivered a total of about two thousand five hundred (2,500)
metric tons, and arrangements had been made for furnishing and delivering more than 5,000 tons additional in that month. No payment had up to that time been made for the tonnage deilvered, for which nearly one million three hundred thousand dollars ($1,-300,000) was due and unpaid by the United States, and for which the producers of copper, for whom and in whose behalf, as well as for itself, the claimant company was acting, were pressing the claimant company to obtain payment from the Government and to account therefor to said producers respectively. Thereupon, on the 10th of April, 1918, the officially authorized representative in Washington of the Copper Producers' Committee wrote a letter to the claimant company based on information obtained by said representative from the Ordnance Department of the United States Army, calling attention to the absence of any reply by the claimant company to the Department's letter of March 28, 1918, and stating that the acceptance of that letter, which had been asked for by the Department, would "constitute a part of the record which would have to be completed before any payments can be made." A copy of said letter of April 10th, 1918, is annexed to this petition marked Exhibit "G."

To this letter the claimant company, on the 11th day of April, 1918, made a response to the representative of the Copper Producers' Committee, a copy of which letter is hereto annexed, marked Exhibit "H," and which inclosed a letter of acceptance, also dated April 11, 1918, to the Ordnance Department of the Army, a copy of which is hereto annexed, marked Exhibit "I."

Within said month of April, and again in the month of May, 1918, the claimant company, by its Vice-President, had an inter-
33 view with Mr. Pope Yeatman, Chairman of the Non-Ferrous
Metals Section of the War Industries Board, in which he adopted and reiterated the protest originally made by the United Metals Selling Company, as contained in Exhibit "B" to this petition, dated March 19, 1918, and objected to having an order forced upon the producers for the delivery of 30,000 tons of copper by the first of June, when it was known that not one-half of that quantity could be delivered by that date, except by the displacement of other orders of equal and greater importance, and to thus being

forced to accept the price of $23\frac{1}{2}$ cents a pound for a large tonnage after the period to which that price was limited by Presidential order had expired.

VII. The copper required by the United States under the orders hereinbefore set forth was desired for shipments to France, for use by the French Government, and was in part required to be in sizes and dimensions conforming to French measurements and usage, and not in sizes and dimensions customarily required or used in the United States. The claimant was directed, in the order given to it, to consult the French High Commission and to obtain specific instructions from said Commission as to the sizes and dimensions required. It was also necessary in every case that the claimant company be furnished by the Ordnance Department of the United States Army with independent specification orders, confirming the specifications given by the French High Commission, and also with shipping instructions in detail, without which such copper could not be received or transported by the steamship companies, or by the railroads over whose lines it was to reach the several ports whence it was to be shipped to France.

The claimant company proceeded to furnish, and did furnish and deliver as promptly as possible upon receipt of specifi-
34 cations and shipping instructions, all the copper for which such specifications and shipping instructions were furnished by the French High Commission and by the United States. On or before June 1, 1918, the claimant had furnished and shipped a total of 23,314,085 pounds (10,575 metric tons), which was all the copper that could by possibility have been produced and shipped by that date on the specification orders and shipping instructions then received.

No portion of the 14,000 metric tons for which a specification order dated May 20, 1918, had been received could by any degree of effort or diligence have been produced and shipped by that date (June 1, 1918), having previously been demanded for delivery to mills in this country supplying munitions for the United States Government.

The 18th day of April, 1918, the Ordnance Department of the Army transmitted to the claimant company a blank contract to be executed by the claimant providing for the delivery of the entire 30,000 metric tons or 66,138,000 pounds of refined copper, beginning on the 1st of March, 1918, and to be completed on or before June 1, 1918. The claimant company not being satisfied with the terms of said contract and knowing that the delivery of such a large amount of copper by the first of June, 1918, was impossible and that it was not really desired by the Ordnance Department of the Army, objected to executing said contract, but was again requested in writing by the Ordnance Department of the Army by letter of May 31, 1918, to execute the contract as requested, but still refused to do so.

On the 10th day of June, 1918, the claimant company was again

requested in writing by the Ordnance Department of the
35 Army to sign and return to the department the blank contracts previously transmitted to it.

On June 11, 1918, a contract in amended form was transmitted by the Ordnance Department of the Army to the claimant company, said contract still bearing date as of March 28, 1918; and the company was again requested by said Ordnance Department to execute and return said contract.

On the 27th day of June, 1918, the claimant company wrote a letter to Colonel Samuel McRoberts, Ordnance Department of the United States Army, stating its position to be that it was entitled to full settlement on all copper delivered prior to June 1, at twenty-three and one-half cents (23½ cents), and thereafter to such price as might be fixed by the Price-Fixing Committee and the producers, effective upon the date so fixed. A copy of said letter is hereto annexed, marked Exhibit "J."

On or before July 2, 1918, the claimant had furnished and shipped a further total of 19,916,895 pounds (9,034 metric tons), which was all the copper that could by possibility have been shipped by that time on the specification orders and shipping instructions then received, with the exception of 2,405,008 pounds (1,091 metric tons), which was not shipped until after that date, for good and sufficient reasons arising in part from lack of steamer space and in part because of the requirements of other orders for the benefit of the Government, but in respect to which no claim is made, or has been made. No portion of the remaining 20,500,620 pounds (9,299 metric tons) could by any degree of effort or diligence have been produced or delivered prior to July 2, 1918; but all of such remaining quantity was produced and delivered as promptly as possible at various times after said last mentioned date.

36 The above mentioned letter of June 27, 1918, was answered on the 1st day of July, 1918, by a letter of the Ordnance Department, stating that the Department is entitled to the delivery of the entire quantity of said copper at 23½ cents a pound. A copy of said letter is hereunto annexed, marked Exhibit "K."

VIII. Thereafter, on the 2d day of July, 1918, as hereinbefore set forth, the Price-Fixing Committee of the War Industries Board, in pursuance of authority lawfully vested in it and with the approval of the President of the United States, fixed the price of copper at twenty-six cents (26 cents) a pound, effective on and after said 2d day of July.

On or about the same date, all questions then at issue or that might arise between the producers of copper and the United States, as to the price to be paid for copper, under existing contracts or orders, were referred by the Price-Fixing Committee of the War Industries Board to Mr. Pope Yeatman, Chairman, as aforesaid, of the Non-Ferrous Metals Section of the War Industries Board, and said Pope Yeatman was thereby authorized to act as umpire of such controversies. A hearing was thereupon held by said Pope Yeatman, at which the officers of the Ordnance Department of the Army and the officers of the claimant company, respectfully, appeared and stated fully their grounds for claiming—respectively—the officers

of the Government that the price of 23½ cents should continue to prevail on deliveries effected after the 2d day of July, 1918, and the officers of the claimant company that such deliveries should be at the price of 26 cents a pound.

Along with the question arising on the order to the claimant company was submitted to said Pope Yeatman the question of the right of the United Metals Selling Company, hereinbefore
37 referred to and representing the same producers of copper as the claimant company, but upon orders whereby such copper was to be furnished to the United States for its own use and affecting about two hundred millions of pounds of copper. Said Pope Yeatman, shortly after the 2d day of July, 1918, after full hearings, decided, as to the order to the United Metals Selling Company for 200,000,000 pounds, that so much of said copper as was either delivered before the 2d day of July, 1918, or as might, by the exercise of reasonable diligence on the part of said United Metals Selling Company or of the producers represented, have been delivered prior to said 2d day of July, 1918, should be paid for at 23½ cents a pound, but that such as neither was, nor could have been, delivered by said 2d day of July, 1918, and was delivered afterwards, should be paid for at the rate of twenty-six cents (26 cents) per pound. Said orders for 200,000,000 pounds were accordingly settled and paid for on the principle so decided by said Yeatman. After the hearing had been closed, however, but before any formal decision could be rendered by him on the order to the claimant company, involved in the present case, the Ordnance Department of the Army, knowing of the rule and principle announced by him and with a view to prevent its being applied to the transaction herein involved, undertook to withdraw the controversy from his consideration upon the ground or pretence that there was a complete and perfect contract between the claimant company and the United States for delivery of the entire amount of copper at 23½ cents a pound and that, therefore, there was no ground for arbitrating anything. A copy of the letter of the Ordnance Department, undertaking so to withdraw the controversy from the consideration of said Pope Yeatman, is annexed hereto as Exhibit "L."

38 A copy of said letter was transmitted to the claimant company by said Pope Yeatman by a letter of August 16, 1918, a copy of which is hereto annexed, marked Exhibit "M."

On the same date the claimant company wrote a letter to the Procurement Division, Ordnance Office, War Department, stating that it was sending to the disbursing officer in New York various invoices covering shipments of copper made since July 2, 1918, at 23½ cents per pound, but protesting against the payment of any less than 26 cents per pound, a copy of which letter is hereto annexed, marked Exhibit "N."

On the 11th day of September, 1918, the claimant company wrote to said Pope Yeatman, protesting against the action of the Ordnance Department, a copy of which letter is hereto annexed, marked Exhibit "O."

IX. Meanwhile from time to time and as fast as possible after specifications were furnished by the French High Commission and the Ordnance Department and shipping instructions could be received from the proper authorities of the Ordnance Department of the United States, the entire remaining quantity of copper covered by the order, to wit, twenty million five hundred thousand six hundred and twenty (20,500,620) pounds, were delivered by the claimant company, all after the 2d day of July, 1918.

X. On or about the 10th day of June, 1918, the Ordnance Department submitted to the claimant company a form of contract, covering the transactions hereinbefore set forth, with the request that said contract be executed, with which request the claimant company declined for a long time to comply.

On the 7th day of October, 1918, at which time a large amount of money was due the claimant and was being withheld from
39 it because the contract was not signed, the Ordnance Department wrote the claimant company a letter, a copy of which is hereunto annexed, marked Exhibit "P," requesting that the contract be returned or that the claimant arrange with the Procurement Division for the issuance of a procurement order which should be sufficient to support payments until the formal contract should be executed. In response to this letter, on the 8th day of October, 1918, claimant wrote the Ordnance Department, transmitting copy of the letter or order of March 28, 1918, hereinbefore referred to and annexed to this petition as Exhibit "E" (a copy of which letter is hereto annexed, marked Exhibit "Q"). In response to this letter the claimant was informed, by a letter of the Finance Division of the Ordnance Department, dated October 14, 1918, that said letter of March 28th was not a procurement order at all, and transmitted to the claimant a communication from the Ordnance Department at Washington, stating that the Legal Section, Procurement Division, advised that office that there was no record of a procurement order and that the contract had not been signed. Said communication from the Ordnance Department at Washington, dated October 4, 1918, is hereto annexed, marked Exhibit "R," and said letter from the Finance Division of the Ordnance Department, dated October 14, 1918, is hereto annexed, marked Exhibit "S."

This letter was answered by the claimant company under date of October 16, 1918, addressed to the Ordnance Department at Washington, a copy of said letter being hereto annexed, marked Exhibit "T." This letter was replied to on the 30th day of October, 1918, by the Ordnance Department by letter addressed to the claimant company, a copy of which letter is hereto annexed, marked Exhibit "U."

40 The last delivery of copper in connection with the order in question was made on or before November 15, 1918, and amounted to 433,483 pounds. Various quantities of copper, ranging from 65,018 pounds to 1,037,903 pounds in amount, had been delivered on various dates, 33 in number, between July 31, 1918, and November 15, 1918, the date of the last delivery. This copper

consisted entirely of Calumet & Hecla billets. The reason why deliveries continued to so late a date is that these billets had to be cast in special molds, which had first to be expressly made in millimeter sizes to conform to French specifications. It was a practical impossibility first to make the molds and then to cast the billets, with the output limited by the capacity of the molds, so as to complete deliveries at an earlier date.

XI. Thereafter the United States Government, by its authorities, continually refused to make any payments until the claimant should execute a contract in due form which would be sufficient to support payments, and transmitted to the claimant company a form of contract, purporting to have been signed and executed on the 28th day of March, 1918, but which was not, in fact, executed on that date and which the claimant, long after the delivery of all the copper covered by the original order, executed and signed under protest and with express reservations. A copy of said contract or instrument in the form of a contract, and purporting to be dated March 28, 1918, was signed by the company on or about the 13th day of January, 1919, and a copy thereof is hereunto annexed, marked Exhibit "V." Said contract or instrument in the form of a contract was identical in terms with that first transmitted by the Ordnance Department of the Army to the claimant company under date of April 18, 1918, with a difference only in the name of the contracting officer.

41 A copy of the protest and reservations, dated January 13, 13, 1919, is hereto annexed, marked Exhibit "W." The receipt of this contract was acknowledged by letter of the Ordnance Department, dated January 14, 1919, a copy of which is hereto annexed, marked Exhibit "X." The claimant company, by letter of January 17, 1919 (a copy of which is hereto annexed, marked Exhibit "Y"), wrote the Ordnance Department of the Army, requesting that due note be taken of the fact that, contemporaneously with the delivery on behalf of the company of the executed contract, there was delivered to the contracting officer of the Department the company's letter, dated January 13, 1919, stating its protests and reservations. This letter was answered by the Ordnance Department of the Army, under date of January 22, 1919, a copy of which is hereto annexed, marked Exhibit "Z," acknowledging the receipt and filing of the claimant company's protest.

XII. Thereafter the claimant company was paid at the rate of 23½ cents a pound for all the balance of the copper for which it had not been previously paid.

XIII. By the National Defense Act of June 3, 1916 (Chapter 134, Sec. 120, 39 Stat. 213), compliance with all orders for products or material is made obligatory. The refusal to comply therewith is made a criminal offense, punishable by fine and imprisonment and the seizure of the plant of the manufacturer of such products or material, and it is provided by said section that the compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material

shall be fair and just. The price of twenty-six (26) cents a pound was, from and after the 2d day of July, 1918, the fair and
42 just compensation for copper and was so fixed by competent authority as aforesaid.

XIV. Under the provisions of law and executive order and particularly of the act of March 2, 1919 (Chapter 94, Section 1, 40 Stat. 1272), there was constituted within the War Department a Board of Contract Adjustment, for the consideration and settlement of all war contracts, orders, or agreements, whether formal or informal, and to said Board claimant submitted its claim. Said claim was, by said Board, disallowed, whereupon the claimant appealed to the Secretary of War from said disallowance. The decision of said Board was, by said Secretary, affirmed.

XV. By Section 2 of the same act, jurisdiction is given to this court to find and award fair and just compensation due on any such war contracts, orders or agreements, whether formal or informal, and by Section 145 of the Judicial Code of March 3, 1911 (Chapter 231, 36 Stat. 1136), this court also has jurisdiction of all claims founded upon any contract, expressed or implied, with the Government of the United States, as well as of all claims founded upon the Constitution of the United States, and claimant relies upon the Fifth Amendment to the Constitution of the United States, providing that private property shall not be taken for public use without just compensation.

XVI. The claimant corporation and its officers are citizens of the United States and have at all times borne true faith and allegiance to the Government of the United States. The claimant is the owner of this claim and no assignment or transfer thereof has been made otherwise than as herein stated.

43 & 44 XVII. The claimant prays judgment as follows:

20,500,620 pounds of copper at 26 cents a pound....	$5,330,161.20
Less payments received at 23½ cents per pound....	4,817,645.70
Balance	$512,515.50

KING & KING,
Attorneys for Claimant.

GEORGE A. KING,
CHARLES EARL,
Of Counsel.

State of New York,
County of New York, ss:

Joseph Clendenin, being duly sworn, deposes and says: I am Vice-President of American Smelting and Refining Company, claimant

herein; I have read the above petition and the facts therein stated are true, to the best of my knowledge and belief.

JOSEPH CLENDENIN.

Subscribed and sworn to before me this 5th day of November, 1920.

[SEAL.]

S. KALISCHE,
Notary Public, Queens County.

Certificate filed in Queens County, No. 2887.
N. Y. County No. 359.
N. Y. Register No. 1364.

45 VIII. *Exhibits to Amended Petition.*

EXHIBIT A.

War Department,

Office of the Chief of Ordnance,

Procurement Division,

Sixth and B Streets, N. W.,

Washington.

P. R. 2158—Item #1.
P. R.

March 14, 1918. M. D. W./bef.

United Metals Selling Co.,
42 Broadway,
New York City.

GENTLEMEN:

Subject: 30,000 Metric Tons (66,138,000 Pounds) Copper for the French Government.

1. I am directed by the Acting Chief of Ordnance to advise you that the Procurement Division is prepared to procure from you 30,000 Metric Tons (66,138,000 pounds) of Copper—Prime Lake or Electrolytic—at a price of 23½c. net per pound, F. O. B. New York basis.

2. Deliveries to extend over a period of six months and are to be made at the rate of 5,000 Metric Tons per month starting with March. Attention is directed to Shipping Instructions #4670 issued under date of February 23d to be applied on this order, which covers the March delivery.

3. It is requested that your Company keep in touch with the French High Commission as to shapes, sizes and specifications which they will require on each month's shipments.

4. It is also directed that you keep in touch with the Supply Division, Ordnance Department, with reference to complete instructions as to the points of shipment to the various ports on the Atlantic Sea Board.

5. The above mentioned copper is to be Prime Lake or Electrolytic, 99.9% pure and not less than 99.88% pure according to the standard of the American Society for testing metals.

6. Usual Government terms of payment will prevail, and all that will be necessary for you to do is to forward assay certificate, weight certificate, with attached affidavit certifying to the correct-
46 ness of these two, together with duplicate bill of lading to the Ordnance Department.

7. Your acceptance of this letter is requested pending issuance of formal contract which will be made out in a few days.

Respectfully,

RAW MATERIALS SECTION,
R. P. LAMONT,
Lt. Col. Ord. N. A.,
By T. S. CHALMERS,
Capt. Ord. R. C.

EXHIBIT B.

United Metals Selling Company,

42 Broadway.

New York, March 19, 1918.

War Department,
Procurement Division,
Sixth and B Streets, N. W.,
Washington, D. C.

GENTLEMEN:

Subject: 30,000 Metric Tons (66,138,000 Pounds) Copper for the French Government.

Reference: P. R. #2158—Item 1.

Sym. P. R.

File P. 470. 15/6599.

This will acknowledge receipt of your letter of the 14th instant, in which you state that you are directed by the Acting Chief of

Ordnance to advise us that the Procurement Division is prepared to secure from us 30,000 metric tons of copper at 23½ cents per lb. f. o. b. New York basis, for deliveries extending over a period of six months, beginning with March.

By the terms of the President's announcement, dated January 23, we are precluded from confirming this order for delivery beyond June 1.

We would therefore ask you to correct the order to read 15,000 tons. If, however, you wish us to fill the order for the entire 30,000 tons, may we suggest that you make out two separate orders,
47 one for 15,000 tons at the fixed price of 23½ cents per lb., and another for 15,000 tons at a price that may be determined later, applicable to the months of June, July and August.

Yours truly,

UNITED METALS SELLING CO.,
By T. WOLFSON,
Vice-President.

EXHIBIT C.

War Department,

Office of the Chief of Ordnance,

Procurement Division,

Sixth and B Streets N. W.,

Washington.

No. P4219—1788A.
Sym. PR P 470.15/7000.

March 23, 1918. MDW/bef.

United Metals Selling Co.,
42 Broadway,
New York City.

GENTLEMEN:

Subject: 30,000 Metric Tons Copper for the French Government.

1. I am directed by the Acting Chief of Ordnance to acknowledge your letter of March 19th with reference to your inability to deliver copper over a period of six months in accordance with instructions as outlined in above War Order due to expiration of agreement on June 1st.

2. The Department will issue today an amended contract requesting that you deliver the entire quantity of 30,000 Metric Tons as called for on War Ord. P-4219-1788A on or before June 1, 1918.

3. It is requested that you advise the Supply Division Ordnance Department, the quantities and specifications as to sizes and shapes

of the Copper which you have ready for shipment at the present time. On receipt of these advices by the Supply Division, you will be given Shipping Instructions for delivery to various ports on the Atlantic Sea Board.

48 4. Close Cooperation between your Company and the Supply Division, Ordnance Department (Major Jewett) will facilitate prompt movement of the Copper from the refineries.

5. It is requested that you acknowledge receipt of this letter.

Respectfully,

RAW MATERIALS SECTION.
R. P. LAMONT,
Lt. Col. Ord. N. A.,
By T. S. CHALMERS,
Captain Ord. R. C.

Exhibit D.

War Department.

Procurement Division,

Office of the Chief of Ordnance,

Sixth and B Streets N. W.,

Washington.

March 25, 1918. M. D. W./bef.

In replying refer to No. P. 4219-1788A.

Sym. P. R.
File P. 470.15

7048.

United Metals Selling Co.,
42 Broadway, New York City.

Gentlemen:

Subject: 30,000 Metric Tons of Copper for the French Government.

1. I am directed by the Acting Chief of Ordnance to acknowledge your letter of March 5th on which, the Department have been advised by Mr. Moschauer, you have failed to receive definite information.

2. The questions brought up in your letter were answered fully in the Procurement Order P. 4219-1788A, which possibly you have not received; and, in order to facilitate movements from your end, the Department will give you the information again as follows:

49 (*a*) All Copper shall be shipped in shapes specified by the French High Commission.

(*b*) All Copper for delivery at New York harbor should be taken up with the Ordnance Officer, Port of Embarkation, 90 West St., Hoboken, N. J. All Copper for delivery alongside steamers in Baltimore should be taken up with the Baltimore Depot, Q. M. U. S. Expeditionary, Canton, Baltimore, Md., Coca Cola Bldg., Attention of Captain Lewis.

(*c*) Payments will be made in accordance with previous arrangement with the Ordnance Department.

(*d*) Inspection on the part of the French Government will be made at the refineries by parties designated by the French High Commission.

3. Attention is directed that you must, under no consideration, take up with the Officer at Baltimore or Hoboken relative to the information as to where deliveries should be made for loading on ships unless you have the amounts available for immediate delivery. This point can not be impressed upon you too strongly, for after arranging steamer space, it upsets the whole shipping program to fall down on the amounts which arrangements are made for.

4. Attention is also directed that the entire quantity of 30,000 Metric Tons, as called for on War Ord. P. 4219-1788A, is to be delivered on or before June 1, 1918.

Respectfully,

RAW MATERIALS SECTION.
R. P. LAMONT,
Lt. Col. Ord. N. A.,
By T. S. CHALMERS,
Capt. Ord. R. C.

50 EXHIBIT E.

United Metals Selling Company,

42 Broadway.

New York, March 26, 1918.

War Department,
Procurement Division,
Office of the Chief of Ordnance,
Washington, D. C.

(Attention Capt. Chalmers)

GENTLEMEN:

Subject: 30,000 Metric Tons of Copper for the French Government.

Reference: P.—4219-1788A, P. R. P. 470.15/7000.

We duly received your letter of March 23 in reference to 30,000 metric tons of copper for the French Government.

The matter was taken up to-day by the Copper Producers' Committee, and it was decided that this entire order be handled by the

American Smelting & Refining Company, intsead of by the United Metals Selling Co.

As you are perhaps aware, the handling of copper has been divided by the Committee so that the United Metals Selling Company handles all the domestic business, and the American Smelting & Refining Company the export business. This order, therefore, would properly come under the jurisdiction of the American Smelting & Refining Co., who are much better organized for the handling of that business than is the United Metals Selling Company.

We would therefore request you to please change this procurement order to apply to the American Smelting & Refining Co., who, we assure you, will give the matter very prompt attention. The A. S. & R. Co. is now handling large export shipments against contracts made directly with the French Republic, and they tell us that it will quite fit in with their operations to handle this present order along with the other shipments.

Yours truly,

UNITED METALS SELLING CO.,
By T. WOLFSON,
Vice-President.

51 EXHIBIT F.

War Department,

Office of the Chief of Ordnance,

Procurement Division,

Sixth and B Streets N. W.,

Washington.

Ref. No. P. R. 2158.
Sym. P. 4219-1788 A.
File P. R.

March 28, 1918. M. D. W./bef.

American Smelting & Refining Co.,
120 Broadway,
New York City.

GENTLEMEN:

Subject: 30,000 Metric Tons Copper for French Government.

War Ord. P. 4219-1788 A.

1. I am directed by the Acting Chief of Ordnance to advise you that the Procurement Division is prepared to procure from you 30,000 Metric Tons (66,138,000 pounds) of Copper at a price of 23½c. per pound net, f. o. b. New York basis.

2. Deliveries are to be completed on or before June 1, 1918.

3. Shipping Instructions with reference to all shipments should be taken up with the Supply Division, Ordnance Department, Major Jewett.

4. It is requested that your Company keep in touch with the French High Commission, as to shapes, sizes and specifications, which they will require on this contract.

5. Inspection on the part of the French Government will be made at the refineries.

6. Payment papers are to be made out in accordance with attached instructions pertaining to shipment of raw materials and payment papers.

7. The above mentioned Copper is to be prime lake or electrolytic 99.9% pure not less than 99.88% pure according to standard of American Society for testing materials.

52 8. Your acceptance of this letter is requested pending issuance of formal contract which will go forward in a few days

Respectfully,

RAW MATERIALS SECTION.
R. P. LAMONT,
Lt. Col. Ord. N. A.,
By T. S. CHALMERS,
Capt. Ord. R. C.

Attachment: (1) copy of instructions on shipments.

EXHIBIT G.

Copper Producers Committee,

827 Munsey Building.

Edward Moschauer, Washington Representative.

Washington, D. C.,
April 10, 1918.

American Smelting & Refining Company,
120 Broadway,
New York, N. Y.

GENTLEMEN:

We do not find in our files a reply from you to the Raw Materials Section, Procurement Division, to their letter of March 28th, No. P. 4219-1788 A. The acceptance asked for in paragraph 6 of that letter will constitute part of the record which will have to be completed before any payments can be made.

Kindly send us a copy of your reply. Will you also arrange in the future to include a carbon copy of all letters addressed to this office as we very often find it convenient to use such copies, and of course

extra copies of all letters addressed to the various departments in connection with the 30,000 ton order.

Yours truly,

COPPER PRODUCERS COMMITTEE.
EDWARD MOSEHAUER.

53 EXHIBIT H.

American Smelting & Refining Co.,

120 Broadway.

New York, April 11, 1918.

Mr. Edward Mosehauer,
Room 827, Munsey Building,
Washington, D. C.

DEAR SIR:

Your letter of April 10th. Capt. Chalmers' letter of March 28th, referred to was received in my absence from the office. I hoped that the matter of acknowledgment was a formality and not necessary as Mr. Clendenin did not acknowledge it, simply leaving the letter for me. Because of the f. o. b. New York basis clause, and because of the fact that there were several open questions as to charges for extra shapes, etc., I hoped this would all be straightened out by you before we were obliged to formally accept the letter. You now advise, however, that such a formal acceptance is necessary, and Mr. Wolfson has told me he believes it proper for us to acknowledge the letter of March 28th as it stands.

I am therefore writing the letter and sending it to you herewith for you to transmit to Capt. Chalmers if everything seems to be in order.

Yours truly,

AMERICAN SMELTING & REFINING CO.
H. M. BRUSH.

H. M. B. K. S.

EXHIBIT I.

American Smelting & Refining Co.,

120 Broadway.

New York, April 11, 1918.

Lieut. Col. R. P. Lamont,
Procurement Division,
Raw Materials Section,
Washington, D. C.

Attention Capt. Chalmers.

DEAR SIR:

Subject: 30,000 Metric Tons Copper for French Government. War Ord. P. 4219, 1788 A.

54 We have your favor March 28th under the above reference number, and take pleasure in accepting your letter as above pending issuance of formal contract which we hope to receive in the near future.

Yours truly,
AMERICAN SMELTING & REFINING CO.
H. M. BRUSH.

EXHIBIT J.

American Smelting & Refining Co.,

120 Broadway.

New York, June 27, 1918.

Colonel Samuel McRoberts,
Ordnance Department, N. A.,
Washington, D. C.

MY DEAR SIR:

Referring to proposed contract for 30,000 tons of copper, dated March 28, 1918, we beg to say:

1. The contract specifies deliveries are to begin on or before March 1, 1918, and that they are to be completed on or before June 1, 1918.

2. The Procurement order was originally tendered March 14 for deliveries over a period of 6 months (March—August) and refused because the United Metals Selling Company felt unauthorized to accept orders for delivery beyond May 31 at the fixed price of $23\frac{1}{2}$ cents per pound.

3. The Procurement order was thereupon changed and tendered March 23 to United Metals Selling Co. for delivery on or before June 1, 1918, at the $23\frac{1}{2}$ cent price, and then was followed up March 25 with instructions to them indicating that the copper was to be supplied in shapes as specified by the French High Mission. At the request of the United Metals Selling Co. the order was placed with this Company by letter dated March 28, 1918.

Shipping instructions have since been received, as follows:

55	March 25	2,500 tons	
	April 9	6,300 "	
	" 10	1,200 "	
	" 20	1,500 "	
	June 1	10,300 "	
			21,800 tons
	Shipping instructions have not been received for any part of the remaining		8,200 "
	Total		30,000 tons

5. We submit, therefore, that the contract as tendered has not been carried through by completion of delivery of the 30,000 tons on or before June 1, 1918; that this was due to no fault of ours, in that we have with the utmost diligence delivered the copper as and when called for by the Government, and that therefore we are in no respect responsible for the delayed delivery.

6. That notwithstanding contract calls for delivery of the 30,000 tons on or before June 1, 1918:

Shipping instructions were received prior to that date (March 25—April 20) for only	11,500 tons
Shipping instructions were received June 1 for	10,300 "
We have not yet received instructions for the remaining	8,200 "
	30,000 "

7. That the contract provision as to time of delivery could not be carried out:

(*a*) Because shipping instructions were not supplied by Government;

(*b*) If the shipping instructions had been supplied the copper was not in hand, having been demanded by other departments of Government for delivery to mills in this country.

(*c*) If the shipping instructions had been supplied there were no ships tendered to take it.

56 (*d*) The copper has been delivered practically immediately against shipping instructions as and when received, and to date the total quantity delivered is 18,299 tons.

8. That it is our understanding the price of 23½ cents applied only to deliveries effected to and including May 31, 1918, as per the President's Proclamation.

9. We think, therefore, we are entitled (1) to full settlement on all copper delivered prior to June 1st at the price of 23½ cents; (2) that on all copper delivered since June 1st we are entitled to the 23½ cents plus any increase that may be agreed upon between the Price-Fixing Committee and the Producers effective June 1st to this date; and (3) that all copper delivered hereafter be at the price agreed upon between the Price-Fixing Committee and the Producers as of date of shipment. We respectfully ask that contracts be re-drafted accordingly.

Yours very truly,

JOSEPH CLENDENIN.

EXHIBIT K.

War Department,

Office of the Chief of Ordnance,

Procurement Division,

Sixth and B Streets N. W.,

Washington.

PR P4219—1788A.

HC/mh.

July 1, 1918.

P 470 15/10106.

American Smelting & Refining Co.,
120 Broadway, New York:

Attention of Capt. H. Corliss.

Attention Mr. Joseph Clendenin, Vice-President.

Subject: 30,000 Metric Tons Copper.

SIRS:

1. I am directed by the Acting Chief of Ordnance to acknowledge receipt of your letter of June 27th, 1918, with regard to a contract for 30,000 Metric Tons of Copper, dated March 28th, 1918.

57 2. The contents of your letter has been carefully noted, and you are advised that this Department feels that in view of you having accepted this office's letter of March 28th, P 470,

15/7201 by yours of April 11th, P 470. 15/8378, that the Department is entitled to the delivery of the entire 30,000 Metric Tons at the price mentioned therein—namely, 23½ cents per pound, f. o. b. New York basis.

3. Insofar as the delay in deliveries is concerned, it is called to your attention that on May 2d you requested of Major Chalmers to be allowed to continue deliveries beyond June 1, 1918.

4. The Department therefore requests that the contract in question be executed and returned.

Respectfully,

SAMUEL McROBERTS,
Colonel Ord. N. A.,
By R. P. LAMONT,
Lt. Col. Ord. N. A.

EXHIBIT L.

TSS/emp.

PL P4219—1788A.

August 15, 1918.

Capt. Schultz.

Mr. Pope Yeatman,
War Industries Board,
Council of National Defense,
18th & D Sts. N. W.,
Washington, D. C.

Through Jajor J. H. K. Davis, Laison Officer.

Subject: Contract Between American Smelting & Refining Company and the United States, War Ord. P4219—1788A, for 30,000 Metric Tons of Copper, at $0.235 per Pound.

SIR:

1. I am directed by the Chief of Ordnance to refer to a contract between the American Smelting & Refining Company and the United States, War-Ord-P4219-1788A, for 30,000 metric tons of Copper at $0.235 per pound, dated March 28, 1918.

58 2. Deliveries under the terms of this contract were to commence on or before March 1, 1918, and to be completed on or before June 1, 1918. As of July 1, 1918, the Contractor had failed to deliver 24,340,900 pounds of copper.

3. The Contractor contends that it understood the price of $0.235 applied only to deliveries effected to and including May 31, 1918, and asks to be permitted to charge $0.26 for all copper delivered subsequent to July 2, 1918. It will be observed that the Contractor, without objection, made continuous deliveries from May 31 to a time subsequent to July 2, 1918.

4. The terms of the contract outlined above express the bargain between the Contractor and the United States. Neither the Contractor nor the United States may vary the terms of a contract.

5. The procurement Division has no authority to sacrifice the rights of the United States. It is, therefore, respectfully submitted that the American Smelting & Refining Company must deliver to the United States 30,000 metric tons of Copper at $0.235 per pound.

Respectfully,

CHARLES N. BLACK,
Lieut. Col. Ordnance U. S. A.,

By RALPH CREWS,
Lieut. Col. Ordnance U. S. A.

EXHIBIT M.

War Industries Board,

Washington.

B. M. Baruch, Chairman.

August 16, 1918.

Mr. Jos. Clendenin,
c/o American Smelting & Refining Co.,
120 Broadway, New York.

DEAR MR. CLENDENIN:

Enclosed herewith find a copy of a letter signed by the Ordnance Department re the question of contract for 30,000 metric tons of copper on War Order P-4219-1788A. From this it would
59 appear that I have no rights as an arbitrator in the matter of this contract by reason of the Ordnance Department not having authority to alter the terms of the contract.

I am therefore returning the papers you sent me and much regret that the matter could not have been settled along the lines we started out on.

I remain,

Yours very truly,

POPE YEATMAN,
Non-Ferrous Metals Section.

EXHIBIT N.

American Smelting and Refining Co.,

120 Broadway,

Copper Sales Department,

Joseph Clendenin, Manager; Hamilton M. Brush, Assistant Manager.

New York, August 16, 1918.

Capt. T. S. Chalmers,
War Department,
Procurement Division,
6th and "B" Sts. N. W.,
Washington, D. C.

DEAR SIR:

Procurement Order P4219–1788A.

We are sending today to the disbursing officer in New York various invoices covering shipments of copper made since July 2d against the above Procurement Order for two reasons:

1. Because we have been urged by your New York Officer that he should have these papers promptly; and

2. Because our subcontractors are pressing us for the money, of which they are in urgent need.

We have held up invoices in the expectation that all or a considerable part of them would be invoiced at 26c. per pound, following appeal to Mr. Pope Yeatman of the War Industries Board, and because of our belief that we were entitled to the 26c. per pound price.

60 We are submitting the invoices made out at 23½c. per pound as we understand that this is the only price at which they will be paid at this time, but we beg to advise that we still maintain that we are entitled to receive the Government's July price; i. e., 26c. per pound on a part of this contract, and we respectfully protest against the presentation of these invoices, under the circumstances and the receipt of payment in accordance therewith, being taken as a waiver of our right to receive this higher price and to take every proper measure to secure its payment.

Yours truly,

AMERICAN SMELTING AND REFINING COMPANY.
H. M. BRUSH.

H. M. B.: K. S.
L. H.
Lt. F.

EXHIBIT O.

American Smelting & Refining Co.,

120 Broadway.

New York, September 11, 1918.

Mr. Pope Yeatman,
War Industries Board,
18th and D Sts.,
Washington, D. C.

DEAR MR. YEATMAN:

Referring to your favor of the 16th ult., with letter attached from the Ordnance Department:

1. In our opinion their statement does not accord with the facts. It assumes the existence of a "contract," definite in terms and voluntarily entered into.

2. We have accepted a so-called Procurement order in the form of a letter as per copy attached advising us that the Department is "prepared to procure from us 30,000 tons of copper, pending issuance of formal contract, etc." This letter, in view of its phrasing, and considering the powers vested in the Secretary of War by recent Congressional legislation, amounted in substance to a requisition and a command.

3. No formal contract has been executed—neither party having signed.

61 4. Final payment has been withheld in the case of each shipment, pending signing of the contract.

5. Our reasons for not signing the contract are well known to you and to the Ordnance Department.

6. We have protested the whole procedure from its inception and many times during the past four to five months.

7. We have delivered the copper as fast as possible, and to the best of our knowledge as fast as required, relying on the Government eventually to heed our protests and give us a square deal.

8. By arrangement in the Price-Fixing Committee conference of July 2d you were authorized to arbitrate and decide the various issues between the producers and representatives of the War and Navy Departments.

9. The proposition has been discussed several times in informal conferences with both sides represented. It has also been formally put up to you as umpire by both sides, as per agreement with the Price-Fixing Committee.

10. We question the right of the Ordnance Department to withdraw from the agreement of July 2d, if its letter of August 15th

was so intended, which we find it difficult to believe, and respectfully ask that you proceed with the arbitration to a decision.

Yours very truly,

JOSEPH CLENDENIN.

Exhibit P.

Ordnance Department,

Office of Ordnance District Chief,

1107 Broadway,

New York, N. Y.

T. D./M.

Finance Division.

October 7, 1918.

American Smelting & Refining Co.,
120 Broadway,
New York, N. Y.

Gentlemen:

We are just advised by the Legal Section, Procurement
62 Division, that contract P–4219–1788–A was sent to you for signature on June 10, 1918, and has not yet been returned. In this connection, you are advised that this office has no recourse but to withhold further payments under this contract until information has been received to the effect that it has been properly executed. In order that it will not be necessary to adopt this course, it is suggested that you arrange with the Procurement Division for the issuance of a procurement order which will be sufficient to support payments until such time as the formal contract is fully executed.

THOMAS DENNY,
Major Ord. Dept., U. S. A.,
Financial Manager.

EXHIBIT Q.

American Smelting & Refining Co.,

120 Broadway.

New York, October 8, 1918.

Ordnance Department,

Finance Division,

1107 Broadway,

New York, N. Y.

DEAR SIRS:

Attention Major Thomas Denny.

Referring to our telephone conversation of this morning, we take pleasure in handing you herewith copy of letter received by this Company under date of March 28th from the Procurement Division.

Would you mind letting us have copy of the letter you received yesterday from the Procurement Division, which was referred to by you in our telephone talk, and which resulted in you writing your letter of October 7th which we have before us.

Yours truly,
AMERICAN SMELTING & REFINING CO.
H. M. BRUSH.

63 EXHIBIT R.

P. J. G./as.

Amer. Smelting & Refining Co.

F. 160. 12,243.

5th Ind.

Ordnance Dept.,

Adm. Div.,

Finance Section.

Oct. 4, 1918.

To New York District Ordnance Office,
Finance Division,
New York City:

The Legal section, Procurement Division, advises this office that there is no record of a Procurement Order under P-4219-1788-A

and that Contract under this war Order number, which was sent to the contractor June 10th for signature, has not been returned.

H. A. GIDNEY,
Major Ord. Dept. U. S. A.,
By P. J. GUINTHER,
Lieut. Ord. Dept., U. S. A.

EXHIBIT 8.

Ordnance Department,

Office of Ordnance District Chief,

1107 Broadway,

New York, N. Y.,

Finance Division.

P. A. G./M.

October 14, 1918.

American Smelting & Refining Co.,
120 Broadway,
New York, N. Y.

GENTLEMEN:

Copy of letter from the Procurement Division forwarded with your letter of the eighth instant in connection with unexpected contract P-4219-1788-A is returned herewith.

This communication is not a procurement order and is not sufficient to support payments to the American Smelting & Refining Company. For your information, we transmit copy of communication from the Washington Office stating that no procurement order has been issued and that the formal contract sent to you for signature on June 10, 1918, has not been signed.

In order that it will not be necessary to withhold payment,
64 it is suggested that you either arrange for the issuance of a procurement order or execute the contract sent to you several months ago.

THOMAS DENNY,
Major Ord. Dept. U. S. A.,
Financial Manager,

By P. A. GALLEHER,
Captain Ord. Dept. U. S. A.,
Disbursing Officer.

Exhibit T.

American Smelting & Refining Co.,

120 Broadway.

New York, October 16, 1918.

Procurement Division,
Office of the Chief of Ordnance,
War Department,
Washington, D. C.

Gentlemen:

(1) Your attention is respectfully invited to the letter of the Finance Division, Office of Ordnance District Chief, 1107 Broadway, New York, to this Company, dated October 7, 1918, copy of which is enclosed.

The payments thus withheld by the Finance Division amount in the aggregate, at the present time, to approximately $782,000.

(2) Referring to contract P.-4219-1788-A, mentioned by the Finance Division, at no time since June June 11, 1918, when it was tendered to us for execution, could this Company have executed and delivered the same without assuming an obligation to perform the impossible and without putting itself in the position of having committed a breach of contract from the moment of its delivery.

(3) At no time since the contract was tendered could this Company have executed the same without binding itself to accept a price for a large part of the tonnage involved, inadequate in itself, and less than the price which it was generally thought would shortly be fixed by Governmental authority, or less than the price actually fixed by the Price-Fixing Committee of the War Industries
65 Board on full information and after extended hearings on July 2, 1918.

(4) This Company can not now execute and deliver the contract in question without forthwith putting itself in default thereunder and without waiving its claim to be paid the price so fixed on the tonnage in question and abandoning all its rights in the premises.

(5) No suggestion has ever been made that the Company is not entitled to receive at least 23½ cents per pound on such tonnage. It is understood that the Procurement Division of the Office of the Chief of Ordnance, not only concedes, but maintains, that 23½ cents per pound is payable. In respect of all deliveries hitherto made in this connection, pursuant to the order or orders of the Procurement Division, payments have actually been made on the basis of 23½ cents per pound (with a deduction of 5% pending the receipt of signed contracts), notwithstanding the non-execution of the contract in question, and such payments have been accepted by this Company under protest as to deliveries made on and after July 2, 1918.

It is assumed as of course that the Procurement Division will wish, as a matter of fair dealing, to take such action as will assure the prompt payment of what is admittedly due in any aspect of the matter, and thus avoid the unnecessary hardship which would be suffered by this Company and by the copper producers for whom it acts, if the payments referred to by the Finance Division were indefinitely withheld. On the basis of 23½ cents, the deferred payments involve the tying up of large sums:

Amount of the 5% already withheld................	$750,000
Amount of the 95% now withheld on deliveries made...	732,000
Amount of the 95% threatened to be withheld on deliveries due within 30 days........................	900,000
Amount of the 5% on the two latter sums............	80,000

(6) Should the existence of an executed contract constitute a technical necessity in order to satisfy the requirements of the statutes or the regulations governing the disbursement of public
66 monies, this Company is willing to execute and deliver the contract in question, if it may append thereto, to be considered as part thereof, a stipulation or proviso to the effect that the provision as to deliveries is and has been subject to modification and that the contract price for all copper delivered on and after July 2, 1918, is in controversy and subject to future agreement or determination by competent authority.

(7) Noting the suggestion of Major Denny, Financial Manager, Office of Ordnance District Chief, Finance Division, that we arrange with the Procurement Division "for the issuance of a procurement order which will be sufficient to support payments until such time as the formal contract is fully executed," we would respectfully request the issuance of such an order, on the understanding that we shall not be estopped or otherwise foreclosed thereby from asserting our claim to be paid the higher price mentioned, in effect since July first last, nor be otherwise deprived of any of our existing rights in the premises.

(8) We have agreed to submit our claim in respect to the higher price to the determination of Mr. Pope Yeatman, of the Non-Ferrous Metals Section of the War Industries Board, to whom we understand the matter has been referred with the consent of the War Department by the Price-Fixing Committee.

What we venture to request in the meantime is that the payments now admittedly due be made at once, without prejudice to the rights or interests either of the United States or of ourselves.

Very respectfully,

JOSEPH CLENDENIN.

EXHIBIT U.

October 30, 1918.

American Smelting & Refining Co.,
120 Broadway,
New York.

(Attention Mr. Clendenin.)

GENTLEMEN:

(1) I am directed by the Chief of Ordnance to acknowl-
67 edge the receipt of your letter of October 16, 1918.

(2) In reference contract War Ord. P4219–1788A we are advised that the bargain contemplated the delivery by you of 66,138,000 pounds of copper at 23½c. per pound.

(3) To obtain payment from the United States it will be necessary to furnish an executed contract between yourselves and the United States to the Disbursing Authority.

(4) By timely application extension of delivery requirements could have been obtained by proof of delay due to causes beyond your control and without your fault.

(5) Attention is directed to the fact that your contract contains no liquidated damage clause.

Respectfully,

CONTRACT SECTION.
T. S. SCHULTZ.

EXHIBIT V.

American Smelting and Refining Company
and
United States of America.

Ordnance Department,
U. S. Army.

Fixed Price Contract.

30,000 Metric Tons, or 66,138,000 Pounds of Copper.

Dated March 28, 1918.

Expires June 1, 1918.

(Ordnance Seal.)

These Articles of Agreement, entered into this 28th day of March, 1918, by and between American Smelting and Refining Company, a corporation organized and existing under and by virtue of the
laws of the State of New Jersey, and having its general office
68 at 120 Broadway, New York, N. Y. (hereinafter called the
Contractor), of the first part, and the United States of Amer-

ica, by R. H. Hawkins, Major, Ord. Dept., U. S. A. (hereinafter called the Contracting Officer), acting by and under authority of the Chief of Ordnance, United States Army, and under the direction of the Secretary of War, of the second part:

Witnesseth,

Whereas a state of war exists between the United States of America and the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, constituting a national emergency.

Now, therefore, under the provisions of section 120 of an act of Congress relating to national defense, approved June 3, 1916, and pursuant to all other laws of the United States and Executive Orders of the President of the United States or heads of its departments under which the requirements of advertisement for proposals are dispensed with and contracts in the form hereof duly authorized, and in consideration of the mutual agreements herein contained, the said parties have agreed and by these presents do agree to and with each other as follows, viz:

Article I. The Contractor agrees to make and deliver to the United States 30,000 metric tons, or 66,138,000 pounds, of electrolytically refined copper, or, at its option, Prime Lake copper, 99.9 per cent pure, and in any event either Prime Lake copper or electrolytic copper is to be not less than 99.88 per cent pure, in accordance with the standards of the American Society for Testing Metals. The United States agrees to pay for the copper herein contracted for, all upon the terms and conditions in this contract set forth.

Article II. The Contractor agrees to deliver to the United States the copper herein contracted for on cars or on lighters at or near plants represented by the Contractor, deliveries to begin on or before March 1, 1918, in accordance with shipping instructions of the Chief of Ordnance, at the rate of 10,000 metric tons per month, and to be completed on or before June 1, 1918. Such de-
69 liveries will be f. o. b. cars and on lighters at or near plants, providing such plants are on the Atlantic or Pacific seaboards. Should the copper be shipped from refineries in the interior of the United States, such as from Great Falls, Mont., or the Lake plants in Michigan the Contractor will pay the carload lot freight rate prevailing at the time of shipment from such plant to New York, N. Y. Should the Contractor be required to make delivery by lighter, the United States will pay for such lighterage service at the prevailing market rates. The Contractor agrees to make shipments from such plants as will be most advantageous to the United States' interests, both in the matter of freight and time required for delivery.

The Contractor shall deliver the copper her-in contracted for to the United States in regular commercial shapes, such as ingots, cakes, wire bars, and ingot bars, in accordance with the schedules of the several refineries. Should billets or extra heavy cakes be called for or be required by the United States, the Contractor will be paid the extra charge applying thereto in the particular plant furnishing copper in such shape.

Time being of the essence, the Contractor undertakes to increase the production to such a maximum rate as facilities and equipment permit.

The performance of this contract shall have precedence over all work for parties other than the United States. The Contractor shall, from time to time, and whenever requested so to do by the Chief of Ordnance, furnish to the Chief of Ordnance statements and reports on the progress of the work and any factors bearing on deliveries.

The Contractor will not be held responsible for delays in delivery due to the delay of the United States or the French Government in inspecting, or for other unreasonable delays due to causes beyond the control and without the fault of the Contractor, but simultaneously with the removal of such causes for delay the Contractor shall proceed with the performance of this contract, due allowance for such delay having been made. The Contractor agrees, in
70 view of the emergency necessitating this contract, to use its best endeavors to remove such cause for delay.

In the event of the United States failing to give the Contractor shipping instructions calling for shipment of any part of the copper within the time specified in the Contract, or in the event of the United States specifically instructing the Contractor to store any of the copper, the Contractor agrees to store, at the risk and expense of the Contractor, for a period of thirty (30) days any quantity of copper hereby contracted for without charge. After the expiration of said thirty (30) days, the copper so stored (unless previously delivered hereunder) shall be held by the Contractor at the expense and risk of the United States, it being agreed that the expense of such storage, to be paid by the United States to the Contractor, shall be twenty-five cents (25c.) per ton of 2,000 lbs. per month, which chareg shall include the cost of handling in and out of storage.

The United States agrees to make payment to the Contractor upon presentation of proper storage certificates with the invoice, together with weight and assay certificates, in the same manner as though the copper had been shipped. The Contractor further agrees to make shipment of the copper at any subsequent time upon orders of the United States.

The Contractor at its own expense shall suitably mark the copper and load the same on cars or on lighters and at the cost of the United States after delivery shall ship the copper to any point in the United States, making all arrangements for transportation, all according to the instructions of the Chief of Ordnance.

Article III. The sum of \$0.235 f.o.b. cars New York basis hereby fixed as the contract price of each pound in weight of the copper delivered and accepted, will be paid by the United States to the Contractor as follows:

(1) Upon the certificate of the inspecting and receiving officer showing delivery and acceptance the United States will pay the sum of \$0.235 for each pound in weight of the copper delivered and ac-

cepted as soon as practicable after such certification.

71 To facilitate prompt payments the United States may attach a disbursing officer to the main office or plant of the Contractor. No payments by the United States shall act to prevent the United States from later disputing the validity thereof under this contract.

Article IV. All materials furnished under this contract, the plant, machinery, tools, and equipment, all workmanship, and the copper shall be at all times subject to inspection by the officers or agents of the Ordnance Department or persons designated by the Chief of Ordnance, and the Contractor shall furnish reasonable facilities and assistance for all such inspection, and whatever of the copper does not in all respects fulfill the requirements of the contract shall be rejected.

Should any disputes arise as to the copper delivered being in accordance with specifications, a sample of the copper shall be submitted for analysis to Ledoux & Co., 99 John Street, New York, or to Lucius Pitkin, Inc., 47 Fulton Street, New York, for determination of the analysis. If they are unable to act, an umpire mutually agreeable to the United States and the Contractor shall act, or the Contractor and the United States shall request the president of the Chamber of Commerce of New York City to name the chemist or metallurgist of recognized standing to act as such umpire. The fees and expenses involved in such analysis shall be paid by the party in error. Should there be a default in the quality of the copper received, the Contractor shall bear the expense of shipment to and from the point of delivery.

At the option of the Chief of Ordnance, inspection of the copper at the mill of the Contractor may be waived.

The Contractor agrees to immediately replace, without cost to the United States, all copper so rejected. The Chief of Ordnance may withhold out of payments to be made hereunder on any account an amount sufficient to cover the cost thereof until proper replacement of rejected copper.

Article V. In the event of the Contractor's inexcusable default in making the deliveries herein scheduled, the Chief of
72 Ordnance may cancel this Contract without prejudice to any claim of the United States hereunder, and complete the manufacture or purchase elsewhere, of all or any of the copper herein contracted for then remaining undelivered and charge the Contractor with all loss, damage, and expense in excess of the contract price of the copper incurred as a result of such action.

Article VI. This Contract being necessitated by a state of war now existing between the United States of America and the Imperial German and the Imperial and Royal Austro-Hungarian Governments, it is desirable and expedient that provision be made for its cancellation upon fair and equitable terms in the event of the termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the Chief of Ordnance

should be of the opinion that the completion of this Contract has become unnecessary.

It is therefore provided that at any time, and from time to time, during the currency of this Contract, the Chief of Ordnance may notify the Contractor that any part or parts of the copper herein contracted for then remaining to be delivered shall not be manufactured or delivered.

In the event of the cancellation of this Contract, as in this Article provided, the United States will inspect the completed copper then on hand and such as may be completed within thirty (30) days after such notice, and will pay to the Contractor the price herein fixed for the copper accepted by and delivered to the United States. The United States will also pay to the Contractor all obligations incurred solely for the performance of this Contract of which the Contractor can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the Contractor for work, labor, and service rendered under this Contract.

The United States may refuse to make any payment or to reimburse the Contractor for or on account of the copper to be delivered under this Contract, whether in the process of manufacture or manufactured as provided in this Article, in respect to the delivery of which copper the Contractor shall be in inexcusable arrears at the time of such termination or cancellation.

73 The decision of the Chief of Ordnance as to payments and allowances to the Contractor under this Article, made in accordance with the terms of this Contract and with the definition of "Cost Pertaining to Contracts" issued by the Finance Division, Ordnance Department, United States Army, dated June 27, 1917, made a part hereof, will be final and binding on both parties hereto.

The foregoing provision with regard to payments to be made by the United States upon the cancellation of this Contract shall also apply in the event that performance by the Contractor of this Contract is finally prevented by causes determined by the Chief of Ordnance to have been beyond the control or without the fault of the Contractor.

Article VII. The Contractor hereby, for the consideration herein named, waives and releases all lien or right of lien now existing or that may hereafter arise for work or labor performed or materials furnished or for any other reason or cause under this contract, under any lien law, State or Federal, upon any material, supplies, and the like coming into its possession which it is herein contemplated shall presently or ultimately become the property of the United States; and the Contractor agrees not to create or suffer to be created any mortgage, lien, pledge, attachment, or other incumbrances upon any such material, supplies, or other property in its possession, and in the event that such mortgage, pledge, lien, attachment, or incumbrance is created the Contractor agrees to pay and discharge, or if it disputes the validity of the claim out of which such incumbrance arises, immediately to bond the same to the end that all property shall at all times be and remain free from all incumbrance.

Article VIII. This contract shall not, nor shall any right to receive payment or any other interest therein, be transferred or assigned by the Contractor to any person, firm, or corporation without the consent of the Secretary of War.

The Contractor shall make all subcontracts, purchases, payments, and arrangements for performing this contract in its own
74 name and for its own account, and shall not bind or purport to bind the United States except as the Chief of Ordnance shall otherwise direct in writing. All subcontracts must be approved by the Chief of Ordnance or his duly accredited representative.

The Contractor shall, unless otherwise directed by the Chief of Ordnance, insert in every contract hereafter made for increased facilities, labor, material, supplies, and the like, or otherwise relating to the performance of this contract, a provision that such contract may be assigned by the Contractor and that it relates to a "main contract" between the Contractor and the United States.

Article IX. No Member of or Delegate to Congress or Resident Commissioner, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this article shall not apply to this contract so far as it may be within the operation or exception of section 116 of the act of Congress approved March 4, 1909 (35 Stats. 1109).

Article X. No person or persons shall be employed in the performance of this contract who are undergoing sentences of imprisonment at hard labor which have been imposed by the courts of the several States, Territories, or municipalities having criminal jurisdiction.

Article XI. Except as this Contract shall otherwise provide, any doubts or disputes which may arise as to the meaning of anything in this Contract shall be referred to the Chief *or* Ordnance for determination. If, however, the Contractors shall feel aggrieved at any decision of the Chief of Ordnance upon such reference it shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding on both parties hereto.

Article XII. Wherever the term "Chief of Ordnance" is used in this Contract the same shall be construed to include the Acting Chief of Ordnance or any person designated to act as the Chief of the Ordnance Department, United States Army, or any person who is accredited as his duly authorized representative.

75 Article XIII. Notice under this contract when not actually given to the Contractor shall be deemed to have been sufficiently given to and received by the Contractor when mailed in a sealed postpaid wrapper addressed to the American Smelting and Refining Company, 120 Broadway, New York, N. Y.

Article XIV. This Contract may be completed and so certified by the Chief of Ordnance by the delivery to and acceptance by the

United States of the articles herein ordered, plus or minus five (5) per cent thereof.

Article XV. The Contractor agrees to hold and save the United States, and all persons acting under them, harmless from and against all liability on account of any patent rights granted by the United States which may affect the articles herein contracted for, or their manufacture, or the performance of his contract in any manner whatsoever.

Article XVI. The Contractor agrees to refrain from exploiting by publicity or otherwise its product manufactured in pursuance of this contract, and of any and all contracts and orders heretofore or hereafter entered into or placed with the Contractor, and its products manufactured under any arrangement with the United States whatsoever, and the Contractor agrees to refrain from in any way publicly advertising the fact of the manufacture of said product, and to refrain from publishing or causing or allowing to be published any photographs, drawings, written or printed matter, or other data disclosing the copper or parts of the same, or the process of manufacture, or the plans of the Government, or any information concerning the same or which shall result in such disclosure. The Contractor agrees to submit to the Chief of Ordnance all pictures or printed matter showing, describing, or in any way relating to the progress of the work to be prosecuted under this Contract and under any and all contracts and orders heretofore or hereafter entered into or placed with the Contractor, or under any arrangement with the United States whatsoever, which he may desire to publish, before publishing the same, and the Chief of Ordnance may prohibit such publication. The Contractor further agrees to refrain
76 from giving any information whatsoever relative to any experiments that may be carried out by it at the instance of the United States.

Article XVII. In addition to the ordinary precautions heretofore adopted by the Contractor for the guarding and protection of its plants and work, the Contractor shall provide such additional watchmen and devices for protection of its plants and property and the work in process for the United States against espionage, acts of war and of enemy aliens as may be required by the Chief of Ordnance. The Contractor shall, when required, report to the Chief of Ordnance the citizenship, country by birth, or alien status of any and all of its employees. When required by the Chief of Ordnance, the Contractor shall refuse to employ, or, if already employed, forthwith discharge from employment and exclude from its works any person or persons designated by the Chief of Ordnance for cause as undesirable for employment in a plant engaged on work for the United States. The United States shall pay to the Contractor as part of the cost of the copper any expense incurred by the Contractor which shall be determined by the Chief of Ordnance to be directly caused by the requirements of this Article.

In witness whereof the parties hereto have caused this contract

to be executed under their seals (in sextpulicate) by their respective officers, duly authorized, the day and year first above written.

AMERICAN SMELTING AND REFINING COMPANY,
Contractor.

[SEAL.] JOSEPH CLENDENIN,
Vice-Prest.

Witnesses:

Signatures:
—— ——.
—— ——.

Attest:
W. E. MERRISS,
Secy.

UNITED STATES OF AMERICA,
By R. H. HAWKINS,
Major Ord. Dept. U. S. A.

77 SCHEDULE 1 ATTACHED TO AND A PART OF A CERTAIN CONTRACT BETWEEN AMERICAN SMELTING AND REFINING COMPANY AND THE UNITED STATES OF AMERICA, DATED THE 28TH OF MARCH, 1918.

Detail of Cost Accounting.

The term "cost" as applied to this contract consists of four elements which are concretely defined in the following:

(1) The cost of all direct labor paid for by the Contractor and used in the production of the copper contracted for herein.

(2) The cost of all direct materials contained in or forming part of the copper contracted for herein.

(3) Pro rata share of factory overhead expense applicable to and necessary in connection with the manufacture of the copper contracted for herein.

(4) Pro rata share of administrative and general expense applicable to and necessary in connection with the manufacture of the copper contracted for herein.

The foregoing paragraphs Nos. 1, 2, 3, and 4 are subject to further amplification as contained in the "Definition of cost pertaining to contracts" to be supplied by the Finance Division (Accounting Section) of the Ordnance Department. As conditions arise necessitating changes or modifications in the definitions referred to the Chief of Ordnance will furnish the Contractor with information in regard thereto.

EXHIBIT W.

American Smelting & Refining Co.,

120 Broadway.

Joseph Clendenin, Vice-President.

New York, January 13, 1919.

Procurement Division,
Raw Materials Section,
Office of Chief of Ordnance,
Washington, D. C.

GENTLEMEN:

Attention of Captain T. S. Schultz.

Referring to War Order P4219-1788A, for 30,000 metric tons of copper for the French Government, and to the formal con-
78 tract in relation thereto, forwarded to us in June last, please find herewith the formal contract in question duly executed by this Company in triplicate. The delivery of this executed contract is made under the circumstances and subject to the reservation following:

The formal contract enclosed specifies the price of 23½ cents for the entire tonnage of 66,136,608 pounds. The Company claims the right to receive payment of the balance due on this tonnage, as follows: in respect of 45,635,988 pounds approximately, delivered prior to July 2, 1918, when the price of copper in effect fixed by the Price-Fixing Committee of the War Industries Board was 23½ cents, at the rate of 23½ cents per pound; in respect of 20,500,620 pounds approximately, delivered after July 2, 1918, when the official price in effect was 26 cents per pound, at the rate of 26 cents per pound. For a fuller statement of such claim, and of the grounds on which it is based, reference is made to the letter of appeal addressed by the Company to the Secretary of War, dated November 21, 1918. The Procurement Division has hitherto denied or disputed the right of the Company to be paid at the rate of 26 cents per pound for any portion of the copper delivered. The Company has hitherto declined to execute the formal contract because it failed to stipulate the price of 26 cents per pound for copper delivered after July 2, 1918. Since October 7, 1918, payments on any price basis have been stopped, pending the execution of a formal contract. The balance due and unpaid at 23½ cents is $2,714,477.13, or thereabouts. Both contracting parties are agreed that the Company is entitled to be paid in respect of the balance due at the rate of 23½ cents per pound at least. As it is understood, however, the amount thus admittedly due in any aspect of the matter can not be paid under conditions governing the disbursement of public moneys, in the absence of a formal contract. The contracting officers of the Government

are unwilling to consent to the specification in the contract of any other price than 23½ cents for any part of the tonnage. The
79 Company is unwilling to execute the contract with a provision therein specifying the price of 26 cents for tonnage delivered after July 2, 1918, except with the explanation and reservations contained in this letter. Accordingly,—

The Company executes and delivers the formal contract in question under protest, and subject to the proviso that it shall not be estopped or precluded thereby from asserting its aforesaid claim to the same extent and with like effect as if such formal contract had not been executed and delivered, and that, such formal contract to the contrary notwithstanding, the price lawfully payable in respect to all copper delivered pursuant to the order in question after July 2, 1918, shall remain subject to future agreement between the parties, or to determination by competent authority. The intention of this proviso is that the rights and interests, neither of the United States on the one hand, nor of the Company on the other, in respect to the price matter referred to, as they now exist, shall be in any wise prejudiced or jeopardized by the delivery and acceptance of the formal contract in question with this letter attached, or by the payment and acceptance of the balance due on the price basis of 23½ cents.

It is understood that the provisions of said formal contract in respect to time of delivery shall be deemed to have been modified to correspond with the delivery dates which actually governed.

Very respectfully,

AMERICAN SMELTING & REFINING CO.,
By JOSEPH CLENDENIN,
Vice-President.

EXHIBIT X.

R. H. H. / jsc.

War Department,

Office of the Chief of Ordnance,

Production Division,

Washington.

To insure prompt attention, in replying refer to
P. L. No. P4219—1788A.

Attention of Major R. H. Hawkins.

80 January 14, 1919.

Major Hawkins,

American Smelting & Refining Co.,
120 Broadway,
New York, N. Y.

GENTLEMEN:

1. I am directed by the Chief of Ordnance to refer to your contract for 30,000 metric tons or 66,138,000 pounds of copper.

2. The contract was originally forwarded to you in June, 1918. After a number of conferences the contract in the present form (61285) was executed by you and by the Contracting Officer. Your copy was furnished to your Mr. Charles Earl.

Respectfully, CONTRACT SECTION,
By R. H. HAWKINS,
Major Ordnance Dept. U. S. A.,
Officer in Charge.

EXHIBIT Y.

American Smelting and Refining Co.,

120 Broadway.

Joseph Clendenin, Vice President.

New York, January 17, 1919.

Production Division,
Contract Section,
Office of Chief of Ordnance,
Washington, D. C.

GENTLEMEN:

Attention of Major R. H. Hawkins.

Please accept our thanks for your letter of January 14, 1919, referring to our contract for 30,000 metric tons of copper, noting that

the contract in question, which had been forwarded to us in June, 1918, had after a number of conferences been executed by us and by the contracting officer in the present form (61,285). With a view to completing a correct record of the transaction, we beg to request that due note also be taken of the fact that, contemporaneously with the delivery on behalf of the Company of the executed contract, there were delivered to the contracting officer
81 the Company's letter, dated January 13, 1919, setting forth the circumstances and reservations under which the delivery of the contract was made.

Very truly yours,

AMERICAN SMELTING & REFINING CO.
By JOSEPH CLENDENIN,
Vice-President.

EXHIBIT Z.

R. H. H. / omp.

War Department,

Office of the Chief of Ordnance,

Procurement Division,

Washington.

January 22, 1919.

To insure prompt attention, in replying refer to
P. L. No. P4219—1788A.

Attention of Major R. H. Hawkins.

American Smelting & Refining Co.,
120 Broadway,
New York City.

GENTLEMEN:

1. This is to acknowledge the receipt of your letter of January 17 (P470. 15/12246), relating to your contract for copper, War-Ord.-P4219-1788A.

2. When you executed the contract you brought with the executed copies the letter dated January 13, 1919, to which you refer. That letter was filed in the files of this Division. The Contracting Officer then executed the contract on behalf of the Ordnance Department. The contract as executed by both parties was forwarded to the Auditor for the War Department without a copy of your letter.

3. The legal effect of your letter I can not undertake to express opinion upon. I assume that you signed the contract "under protest."

Respectfully,

CONTRACT SECTION,
By R. H. HAWKINS,
Major Ordnance Dept. U. S. A.

82 IX. *Demurrer to Amended Petition.*

(Filed January 5, 1921.)

The United States, by the Attorney General, demurs to the amended petition filed herein November 27, 1920, upon the ground that the same does not state facts sufficient in law to constitute a cause of action.

FRANK DAVIS, JR.,
Assistant Attorney General.

J. ROBT. ANDERSON,
CROWLEY WENTWORTH,
Special Assistants to the Attorney General.

83 X. *Submission on Demurrer to Amended Petition.*

(January 10, 1921.)

Submitted on demurrer to amended petition by stipulation of the parties.

XI. *Order Sustaining Demurrer to Amended Petition.*

(Filed January 17, 1921.)

Order.

This case coming on to be heard was submitted upon the defendants' demurrer to the amended petition. On consideration whereof it is adjudged and ordered by the court that the defendants' said demurrer to the amended petition be and the same is sustained and the amended petition is dismissed.

It is further ordered that the opinion rendered upon the defendants' demurrer to the original petition stand as the opinion of the court on the question of the demurrer to the amended peition.

84 XII. *Final Judgment.*

(Filed January 17, 1921.)

Upon due consideration of the premises, it is ordered, adjudged and decreed that the defendants' demurrer to plaintiff's amended petition be sustained and that said amended petition be and the

same hereby is dismissed; and it is further ordered that the opinion rendered upon the defendants' demurrer to the original petition stand as the opinion of the court on the question of the demurrer to the amended petition.

By THE COURT.

85 XIII. *Application for and Allowance of Appeal.*

(Filed January 31, 1921.)

From the judgment rendered in the above-entitled cause on the 17th day of January, 1921, the claimant, American Smelting & Refining Company, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Filed January 31, 1921.
Ordered: That the above appeal be allowed as prayed for.
January 31, 1921.

By THE COURT.

86 XIV. *Clerk's Certificate.*

I, J. Bradley Tanner, Chief Clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the demurrer, the argument and submission of the case on demurrer; of the opinion of the court and final judgment, of the order setting aside the judgment and allowing an amended petition to be filed, of the amended petition with exhibits A to Z attached thereto, of defendants' demurrer to amended petition, of the submission on demurrer to amended petition, of the order sustaining the demurrer to amended petition, of final judgment, and application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 1st day of February 1921.

[Seal of the Court of Claims.]

J. BRADLEY TANNER,
Chief Clerk, U. S. Court of Claims.

Endorsed on cover: File No. 28,085. Court of Claims. Term No. 728. American Smelting and Refining Company, appellant, vs. The United States. Filed February 8th, 1921. File No. 28,085.

Supreme Court of the United States.

October Term, 1921.

No. 221.

American Smelting & Refining Company, *Appellant*,

v.

The United States.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

George A. King,
William B. King,
Charles Earl,
George R. Shields,
Attorneys for Appellant.

Supreme Court of the United States

October Term, 1921.

No. 221.

American Smelting & Refining Company, *Appellant*,

v.

The United States.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

George A. King,
William B. King,
Charles Earl,
George R. Shields,
Attorneys for Appellant.

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TABLE OF CASES.

American Smelting & Refining Company, *Appellant*,

v.

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No. 221.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

The Court of Claims dismissed, rec. p. 58, claimant's amended petition, p. 15, upon demurrer, p. 58, with an opinion, p. 10. The claim arises out of the delivery of copper during the war. The question is solely as to the price due therefor. The issues are whether the delivery was under a commandeering order or an express or an implied contract and, in either view, whether the full price legally due has been paid.

I. STATEMENT OF CASE.

The details of the transaction are fully stated in the amended petition, p. 15. The material facts are summarized as follows:

1. Copper being a great fundamental war necessity, limited in possible amount of production, the government early assumed complete control of production and dis-

tribution by price fixing and by securing the organization of a Copper Producers' Committee. This committee, under supervision of the War Industries Board, distributed orders and allocated deliveries and provided that all orders for the use of allied European governments were to be filled by the appellant and all orders for use of the United States by the United Metals Selling Company. Producers were notified that their mines and plants would be taken over, if they failed to conform to arrangement and price. The price was fixed by the President on September 21, 1917, at 23.5 cents a pound. It continued at this figure to June 1, 1918, by another order issued about January 1, 1918. It was raised to 26 cents on July 2, 1918, and so continued. Except for the price fixing, the price of copper would greatly have exceeded these figures.

See amended petition, par. III, rec. pp. 15-16; par. IV, p. 17; Official Report of War Industries Board to the President, Chapter III, p. 130, reprinted as Appendix No. 1, *post*, p. 37, showing history of copper in the war; Extracts from Official Bulletin, Appendix No. 2, *post*, p. 48, showing authority for price fixing. See also War Industries Board Price Bulletin No. 3, "Government Control over Prices," pp. 195-215, 272-284.

2. The price of 26 cents per pound so fixed was fair and just compensation for copper from July 2, 1918, the date when the claim begins, amended petition, par. XIII, p. 25.

3. On March 28, 1918, the following letter, rec. p. 31, was written by the Ordnance Bureau, Procurement Division, to appellant:

"1. I am directed by the Acting Chief of Ordnance to advise you that the Procurement Division is prepared to procure from you 30,000 Metric Tons (66,138,000

pounds) of Copper at a price of $23\frac{1}{2}$ cents per pound net, f.o.b. New York basis.

"2. Deliveries are to be completed on or before June 1, 1918.

"3. Shipping Instructions with reference to all shipments should be taken up with the Supply Division, Ordnance Department, Major Jewett.

"4. It is requested that your Company keep in touch with the French High Commission, as to shapes, sizes and specifications, which they will require on this contract.

"5. Inspection on the part of the French Government will be made at the refineries.

"6. Payment papers are to be made out in accordance with attached instructions pertaining to shipment of raw materials and payment papers.

"7. The above-mentioned Copper is to be prime lake or electrolytic 99.9 per cent pure not less than 99.88 per cent pure according to standard of American Society for testing materials.

"8. Your acceptance of this letter is requested pending issuance of formal contract which will go forward in a few days."

Appellant replied on April 11, as follows, rec. p. 34:

"We have your favor March 28th under the above reference number, and take pleasure in accepting your letter as above pending issuance of formal contract which we hope to receive in the near future."

4. Previous to this, an order for the same quantity of copper at the same price had been given on March 14, 1918, to the United Metals Selling Company, associated with appellant under the Copper Producers' Committee, as stated in par. 1, *ante*, p. 6, to be delivered at 5,000 tons a month from March to August. That company objected to this price for deliveries after June 1. The Ordnance Bureau then ordered the entire delivery to

be made by June 1, 1918. Upon ascertaining that this order was for export, the United Metals Selling Company asked to have it transferred from that company to appellant. This was done under the cooperative system of distribution of orders fixed by the Copper Producers' Committee, under the supervision of the War Industries Board, as stated in par. 1, *ante*, p. 6, whereby these two companies took care of domestic and foreign orders respectively. See amended petition, pars. V, VI, rec. pp. 17-19; Exhibits A to E, rec. pp. 26-31.

5. Deliveries were made as follows:

By April 10, amd. petition, par. VI, rec. p. 19, 2,500 tons.
By June 1, par. VII, p. 20, 10,575 tons.
By July 2, par. VII, p. 21, 20,701 tons.
On July 2, balance undelivered, 9,299 tons or 20,500,620 pounds.

This was the date when the higher price was fixed.

The balance was delivered as promptly as possible between July 2 and November 15, 1918, par. IX, p. 23.

6. The whole amount was not delivered before July 2 because:

(a) Specifications and shipping instructions required by the letter of March 28, 1918, Exhibit F, pars. 3, 4, rec. p. 32, had not been received, amended petition, par. VI, p. 19; par VII, pp. 20, 21; par. IX, p. 23; par. X, p. 24, and

(b) Because other departments of the government had demanded the copper for delivery to mills in this country, amended petition, par. VII, p. 20; Exhibit J, par. 7, p. 35.

7. On April 18, 1918, amended petition, par. VII, rec. p. 20, the Ordnance Bureau transmitted to appellant a blank contract for the delivery of the entire 30,000 tons to be completed on or before June 1, 1918. Ap-

pellant refused to sign it because the deliveries could not be made for the reasons above stated, see par. VII, pp. 20-21. Appellant was asked on May 31, June 10 and June 11 to sign and on June 27, Exhibit J, p. 34, made a full statement of its objections and insisted that all copper delivered after June 1 should be at the price to be officially fixed for deliveries after that date.

8. Thereafter the Ordnance Bureau continued to insist upon the price of 23.5 cents per pound for deliveries after June 1 and the appellant upon the price fixed by the War Industries Board, 26 cents per pound, after July 2, 1918, amended petition, par. VIII, rec. pp. 21-22; Exhibits K to U, pp. 36-46.

9. Payments had been continuously made. But beginning October 7, 1918, par. X, p. 23; Exhibit P, p. 41, and continuing until January 13, 1919, par. XI, p. 24; Exhibits Q to Z, pp. 42-57, the government insisted that a formal contract must be signed in order that further payments should be made even at the price claimed by the government.

10. The amount then due appellant at the price admitted by the government was $2,714,477.13, Exhibit W, p. 54, being for 11,550,966 pounds at 23.5 cents per pound.

11. On January 13, 1919, appellant signed a formal contract, Exhibit V, p. 46. This bore the heading: "Dated March 28, 1918. Expires June 1, 1918." It was drawn up exactly in form as if it were signed on the date which it bears and is throughout wholly inconsistent with conditions existent upon the date of its signature. Its most pertinent passages are, rec. p. 47:

"Now, therefore, under the provisions of Section 120 of an act of Congress relating to national defense, approved June 3, 1916, and pursuant to all other laws of

the United States and Executive Orders of the President of the United States or heads of its departments under which the requirements of advertisement for proposals are dispensed with and contracts in the form hereof duly authorized, and in consideration of the mutual agreements herein contained, the said parties have agreed and by these presents do agree to and with each other as follows, viz:

*   *   *   *   *   *

"Article II. The contractor agrees to deliver to the United States the copper herein contracted for on cars or on lighters at or near plants represented by the contractor, deliveries to begin on or before March 1, 1918, in accordance with shipping instructions of the Chief of Ordnance, at the rate of 10,000 metric tons per month, and to be completed on or before June 1, 1918."

P. 48:

"Article III. The sum of $0.235 f. o. b. cars New York basis hereby fixed as the contract price of each pound in weight of the copper delivered and accepted, will be paid by the United States to the contractor as follows:

Appellant accompanied this by its letter dated January 13, 1919, Exhibit W, p. 54, which substantially recited the foregoing facts, including the claim for 26 cents per pound for delivery after July 2, 1918, and concluded:

"The Company executes and delivers the formal contract in question under protest, and subject to the proviso that it shall not be estopped or precluded thereby from asserting its aforesaid claim to the same extent and with like effect as if such formal contract had not been executed and delivered, and that, such formal contract to the contrary notwithstanding, the price lawfully payable in respect to all copper delivered pursuant to the order in question after July 2, 1918, shall remain subject to future agreement between the parties, or to determination

by competent authority. The intention of this proviso is that the rights and interests neither of the United States on the one hand, nor of the Company on the other, in respect to the price matter referred to, as they now exist, shall be in any wise prejudiced or jeopardized by the delivery and acceptance of the formal contract in question with this letter attached, or by the payment and acceptance of the balance due on the price basis of 23½ cents."

12. Appellant was thereafter paid 23½ cents per pound for the copper delivered and not paid for, amended petition, par. XII, rec. p. 24.

13. The protests were continuous against delivering any copper after June 1, 1918, for less than the price fixed by the War Industries Board. See protest of United Metals Selling Company, March 19, 1918, Exhibit B, rec. pp. 27-28; repeated refusals to execute formal contract, amended petition, par. VII, pp. 20-21; letter of June 27, 1918, Exhibit J, p. 34; continuous protests on payments for deliveries after July 2, 1918, Exhibit T, par. (5), p. 44; efforts to arbitrate price, amended petition, par. VIII, pp. 21-22; August 15, 1918, Exhibit L, p. 37; August 16, 1918, Exhibit N, p. 39; September 11, 1918, Exhibit O, p. 40; October 16, 1918, Exhibit T, p. 44; January 13, 1919, Exhibit W, p. 54; January 17, 1919, Exhibit Y, p. 56.

14. Claim was presented to the Secretary of War for 2½ cents per pound on the amount delivered after July 2, 1918, and this claim was disallowed, amended petition, par. XIV, p. 25.

15. The Court of Claims sustained the demurrer and dismissed the petition for the following reason, rec. p. 13:

"The letter written by the Ordnance Department to the plaintiff was a proposal that the plaintiff should furnish and deliver a certain amount of copper at a certain

price within a certain time; the acceptance of that proposal in writing by the plaintiff completed the transaction, and the proposal and acceptance together constituted a contract between the parties, and from the instant of the acceptance of the proposal there was a full and distinct accord between them. The plaintiff's protests and reservations made when it signed the formal contract, long after the contract was completed, are of no effect."

Statutes.

The statutes which need to be considered here are quoted in Appendix No. 3, *post,* p. 56. They are the following:

Rev. Stat., Sec. 3744, making it the duty of the Secretary of War to require every contract made by him "to be reduced to writing, and signed by the contracting parties with their names at the end thereof." See *post,* p. 56.

Rev. Stat., Sec. 3709, requiring all purchases and contracts for supplies in any department to be made by advertising for proposals except when the public exigency requires "immediate delivery," when the articles may be procured by open purchase or contract "in the manner in which such articles are usually bought and sold" between individuals. See *post,* p. 56.

National Defense Act of June 3, 1916, Sec. 120, 39 Stat. 213, authorizing the President in time of war "in addition to the present authorized methods of purchase or procurement, to place an order" for material required, making it obligatory under a penalty to furnish the materials ordered and giving precedence to such orders and declaring that the compensation for materials so ordered "shall be fair and just." See *post,* p. 57.

Act of May 20, 1918 (Overman Act), 40 Stat. 556,

authorizing the President to redistribute functions among executive agencies in his discretion. See *post,* p. 58.

Act of March 2, 1919 (Dent Act), 40 Stat. 1272, authorizing the Secretary of War "to adjust, pay or discharge any agreement, express or implied, upon a fair and equitable basis" entered into during the war "for the production, manufacture, sale, acquisition or control of equipment, materials or supplies," when such agreement has not been executed in the manner prescribed by law, and giving jurisdiction to the Court of Claims "to find and award fair and just compensation" in such cases where the adjustment offered by the Secretary of War is unsatisfactory. See *post,* p. 60.

The practical construction of Revised Statutes, Sec. 3744, in *Clark* v. *United States,* 95 U. S. 539, 542, should be considered, declaring that "where a parol contract has been wholly or partially executed and performed on one side," the party performing will be entitled to recover the fair value of his property or services "as upon an implied contract for a *quantum meruit.*"

II. Assignment of Error.

Appellant says that the Court of Claims made the following errors:

1. In holding that the copper in question was not delivered under an order issued by authority of Sec. 120 of the act of June 3, 1916, but under a contract.

2. If the copper was delivered under a contract, in holding that claimant was not entitled to recover the reasonable value of the copper delivered after July 2, 1918, as fixed at 26 cents per pound by proper authority, when the failure to deliver it before that date was due to the acts or default of the United States.

3. In sustaining the demurrer and dismissing claimant's petition.

III. ARGUMENT.

The Issues.

The Court of Claims decided, see *ante*, pp. 11, 12, that the letters of the Ordnance Bureau of March 28, 1918, and of appellant of April 11, quoted, *ante*, p. 7, constituted a contract binding the parties to a price for all deliveries of 23.5 cents per pound as paid.

Appellant maintains:

(1) That the Ordnance Bureau letter of March 28 was an order under Sec. 120 of the act of June 3, 1916, *post*, p. 57; that appellant's letter of April 11 was a declaration of its readiness to fill the order without compulsion; that the compensation to be paid for copper delivered under the order was fixed by the statute at a "fair and just" price and that 26 cents was a fair and just price for all copper delivered after July 2, 1918;

(2) That, if there was a contract at a price of 23.5 cents per pound, deliveries thereunder were limited to June 1, 1918, and it was the fault of the government that the deliveries were not completed before that date;

(3) That, after June 1, 1918, war needs of the government made it appellant's patriotic duty and its consequent legal obligation to continue deliveries despite the government's default and the rise in value and made it the government's legal obligation to pay for losses caused by the default;

(4) That, if, notwithstanding war conditions, appellant was not obligated to continue deliveries after June 1, 1918, it had an election, because of the government's default, either to refuse further deliveries or to continue deliveries and claim damages for the government's default;

(5) That the government is bound by way of damages

for its delay to pay the difference between the contract price and the fair price at the date of the delayed deliveries.

An Order or a Contract.

The first question to be decided here is whether the foregoing transaction discloses a commandeering order or a contract.

A Commandeering Order.

The letter of March 28, 1918, rec. p. 31, already quoted here, *ante*, pp. 6-7, does not purport to be a contract. It is headed "War Ord. P. 4219-1788A." Its last paragraph refers to the "issuance of formal contract" in a few days. It is thus classified by the Department itself as a "War Order." Its language that "the Procurement Division is prepared to procure" the copper in question is an expression of authority no less real because politely stated.

The Circuit Court of Appeals for the Second Circuit in *Roxford Knitting Co.* v. *Moore*, 265 Fed. 177, supports this view, in a case going farther than this, saying, p. 188:

> "It must be admitted that neither the National Defense Act nor the Navy Purchase Act prescribe any stereotyped form of order which must be used. An order might be placed under the form and terms of polite request. It is left to the discretion of the government to determine the manner in which orders are to be placed, and how its intentions are to be communicated, orally or by writing. They may be made known by telegram, or by telephone, or by letter. The acts of Congress do not prescribe the method of communication, nor the form of it."

This decision affirmed the District Court in *Moore* v. *Roxford Knitting Co.*, 250 Fed. 278, 283.

The original order to the United Metals Selling Company, Exhibit A, rec. p. 26, identical in language in this respect, is referred to in a letter from the Ordnance Bureau of March 23, 1918, Exhibit C, p. 28, par. 1, as "above War Order" and in par. 2, it is called "War Ord. P-4219-1788A." The Bureau, March 25, 1918, Exhibit D, par. 2, p. 29, calls it "Procurement Order P. 4219-1788A" and par. 4, p. 30, "War Ord. P. 4219-1788A."

The Ordnance Bureau, August 15, 1918, Exhibit L, par. 1, p. 37, twice called the letter of March 28 "War Ord. P. 4219-1788A" and again October 30, Exhibit V, par. 2, p. 46. The War Industries Board did the same, August 16, 1918, Exhibit M, p. 38. Appellant referred to this order as a "Procurement Order" on August 16, 1918, Exhibit N, p. 39, and on September 11, 1918, Exhibit O, par. 2, p. 40. In the form of contract drawn by the Ordnance Bureau and signed on January 13, 1919, Exhibit V, rec. p. 47, quoted, *ante*, pp. 9-10, it is recited that the contract is made "under the provisions of Section 120 of an act of Congress relating to national defense, approved June 3, 1916."

It thus appears that the parties contemporaneously treated this as a Procurement Order, a phrase doubtless derived from Sec. 120 of the act of June 3, 1916, authorizing an order "in addition to the present authorized methods of purchase or procurement."

On October 4, 1918, the Ordnance Bureau said for the first time, Exhibit R, pp. 42-43, that this was not a Procurement Order, sufficient to sustain payments for goods delivered, see Exhibit P, p. 41; Exhibit Q, p. 42; Ex-

hibit S, p. 43, although previously it had been accepted as sufficient authority for payments, Exhibit W, p. 54, including nearly half the deliveries after July 2, 1918. See *ante*, pars. 5, 9, 10, pp. 8, 9.

The acts of the parties also show that they both regarded this as a commandeering order and not a contract. Appellant continued to deliver after the contract date of delivery had passed by the government's fault (par. 6, *ante*, p. 8), and after the fixed price and the fair value had risen (pars. 1, 2, *ante*, p. 6). This was wholly unnecessary unless the deliveries were compulsory. The United States continually insisted upon the order being replaced by a contract, an act equally unnecessary, had a valid contract been already in existence.

Appellant's acceptance of the order was desired to inform the Ordnance Bureau of its intention to comply with the order and did not involve an assent to a present contractual relation. See Exhibit G, record, p. 32; Exhibit I, p. 34. It could have done no less. "Compliance" with the order was "obligatory," under penalty, act of June 3, 1916, *post*, p. 57. This did not involve acceptance of the price named, for the law prescribed "fair and just" compensation. It could imply no acceptance of the price named for deliveries after June 1, 1918, for by its terms, Exhibit F, par. 2, p. 31, all deliveries were to be completed by that date.

ONLY LAWFULLY AN ORDER.

At the date of this transaction, there were only three methods for obtaining supplies authorized by law:

(a) Under Rev. Stat., Sec. 3744, *post*, p. 56, by a written contract signed by both parties;

(b) Under Rev. Stat., Sec. 3709, *post*, p. 56, by open market purchase or contract for "immediate delivery."

(c) Under Sec. 120 of the act of June 3, 1916, *post*, p. 57, by a procurement order.

This transaction did not conform to Sec. 3744; the copper was for future delivery and therefore not under Sec. 3709. It could lawfully be only under Sec. 120 of the act of 1916. The presumption of the legality of an official action is therefore entirely favorable to the view that this was a commandeering order.

The order was given because it was simple and positive and authorized by law. The intention may have been, Exhibit F, par. 8, p. 32, when time permitted, to follow the order by a formal contract complying with Rev. Stat. Sec. 3744. The order bound the party and the material without waiting for a formal contract.

LEGAL CONSEQUENCES OF ORDER.

If this was a commandeering order, what are the legal consequences? Appellant was ordered to deliver 30,000 metric tons of copper at 23.5 cents per pound, deliveries to be completed by June 1, 1918. That was fixed as a reasonable price for deliveries up to July 2, 1918. For later deliveries the same authority fixed the reasonable price at 26 cents per pound. See par. 1, *ante*, p. 6. It was "the fair and just compensation" after that date, amended petition, par. XIII, p. 25.

The requirement of Sec. 120 of the act of June 3, 1916, in regard to compensation is that it "shall be fair and just." The government itself made it impossible to deliver this copper until after July 2, 1918, by not furnishing shipping orders and by diverting the available supply of copper to other purposes. The terms of the statute can only be complied with by paying to the

appellant the "fair and just" compensation provided by the statute for its deliveries after July 2, 1918, as claimed.

The fundamental error in the Court of Claims lies in regarding this transaction, originating in the midst of war, as arising under an ordinary voluntary contract of normal times. The whole case is properly viewed as controlled by war conditions and dominated by the compulsory powers of the government over the productive industries of the country.

COMPENSATION MUST BE JUST.

The Ordnance Bureau in endeavoring to bind appellant by its order to a fixed price acted beyond any executive or even legislative power. The want of authority is extreme. The Bureau undertook to enforce this price beyond the terminal date named in its own order. It directed a price below that fixed by the price-fixing branch of the government. This court has definitely declared the law on this point in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, saying, p. 327:

> "The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; buf when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

The rule has been applied to time of war in *Filbin Corporation* v. *United States*, 265 Fed. 354, 357; 266 Fed. 911; *National City Bank* v. *United States*, 217 Fed.

855; and in England in *Newcastle Breweries* v. *The King* (1920) 1 K. B. 854, and in *Attorney General* v. *de Keyser's Hotel*, 1920 App. Cases, 508, in which Lord Sumner made the following remarks, p. 563, applicable to several features of this case and particularly to the acceptance of the order by the appellant:

"Experience in the present war must have taught us all that many things are done in the name of the Executive in such times purporting to be for the common good **which Englishmen have been too patriotic to contest.** When the precedents of this war come to be relied on in wars to come, it must never be forgotten that much was voluntarily subjected to which might have been disputed, and that the absence of contest and even of protest is by no means always an admission of the right."

SUMMARY.

It is respectfully submitted that the foregoing shows that this copper was furnished under a procurement order under the act of June 3, 1916, and that payment must be made at the "fair and just" price of 26 cents per pound.

Was there a Contract?

If this delivery was not under a commandeering order, as above maintained, it was under some sort of an agreement, express or implied, formal or informal, valid or not binding. Three possible kinds require consideration here:

(a) An express contract in the form of law as required by Rev. Stat., Sec. 3744, p. 56;

(b) An implied contract to pay for goods delivered, where no formal contract existed, recognized in *Clark* v. *United States*, 95 U. S. 539, *ante*, p. 13;

(c) An informal agreement "not executed in the manner prescribed by law," recognized by the Dent Act of March 2, 1919, *post*, p. 60, as requiring adjustment "upon a fair and equitable basis."

Appellant maintains that it is entitled to recover under either of these forms, but that, if there is any contract as distinct from an order, it is properly either an implied contract upon an executed delivery or an informal agreement recognized by the Dent Act.

No Formal Contract.

The only contract in the record complying in form with Rev. Stat., Sec. 3744, is that bearing date March 28, 1918, signed January 13, 1919, Exhibit V, rec. p. 46; amended petition, par. XI, p. 24. It will be recalled, as stated, par. 7, *ante*, p. 8, that from April 18, 1918, the Ordnance Bureau had endeavored to secure appellant's signature to a formal contract. This was continuously refused because appellant would not even seem to concede a price of 23.5 cents after July 2, 1918, until appellant was told that nearly $3,000,000 admittedly due would not be paid without such signature. This, when signed, was accompanied by a protest, Exhibit W, rec. p. 54, reserving all right to 26 cents per pound for deliveries after July 2, 1918, with like effect as if such formal contract had not been executed, *ante*, pars. 8-10, p. 9.

The Court of Claims ignored this formal contract, holding, rec. p. 13, that the Bureau order of March 28, 1918, and claimant's letter of April 11, 1918, Exhibits F and I, pp. 31, 34, made a contract. It was rightfully ignored. It was a mock contract. The deliveries had all been made and five-sixths paid for. Yet this provides for future delivery and payment, specifies the manner and form of delivery, fixes completion of deliveries

at June 1, rec. p. 47, although nearly a third had been made after July 2, provides precedence over private deliveries, p. 48, defines inspection, authorizes cancellation for default and termination for good cause before completion, p. 49, forbids assignment, regulates subcontracts and makes other conditions for its performance, p. 51. Viewed as a contract, all this is mere futility because the goods were delivered and the parties did not mean to obligate themselves to future action. The circumstances show that it was not intended as a contract at all. It was executed because one party refused to pay its admitted obligations unless such a paper were signed.

Such action was positively condemned by the Comptroller of the Treasury in a decision relating to war contracts, November 25, 1918, 25 Comp. Dec. 398, 404:

"Of course it is understood a legal contract can not be made now for articles the Government does not need, and this is true regardless of prior negotiations or understandings, written or oral."

This paper is not within any recognized definition of contract. Chief Justice Marshall in *Sturges* v. *Crowninshield*, 4 Wheaton, 122, said, p. 197:

"A contract is an agreement in which a party undertakes to do or not to do a particular thing."

The latest philosophical writer, 1 Williston on Contracts, says, p. 1:

"A contract is a promise, or set of promises, to which the law attaches legal obligation."

Either definition involves present or future action. A paper relating solely to past performance is not a contract.

VALUE OF THIS PAPER.

This formal contract may have some evidential value as a declaration of what the parties concede to have been their obligations. This is subject to the following qualifications:

(1) The protest accompanying the contract, Exhibit W, rec. p. 54, expressly declares that appellant denies any agreement to accept as in full 23.5 cents per pound for deliveries after July 2, 1918, and asserts a right to 26 cents per pound for deliveries after July 2, 1918. There is thus no admission of the fact here in issue.

(2) Signature to this paper was forced by a threat to hold up $2,700,000 admittedly due. Of what value is evidence so obtained?

PRINCIPLES OF THE FOREGOING.

All the foregoing is in accordance with fully settled principles of law.

1. It may always be shown that an instrument bearing one date was actually signed and delivered on another day. In *District of Columbia* v. *Camden Iron Works*, 181 U. S. 453, this court after citing authorities, says, p. 461:

> "These cases fully sustain the doctrine that parties, situated as here, are not precluded from proving by parol evidence when a deed or contract is actually made and executed, from which time it takes effect."

2. It may always be shown that a paper in form a contract was not intended by the parties as a contract. In *Ware* v. *Allen*, 128 U. S. 590, this court quoted with approval the opinion in *Pym* v. *Campbell*, 6 Ell. & Bl. 370, 373, as follows, p. 596:

"The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

See also *Burke* v. *Dulaney*, 153 U. S. 228, 238; *Brady* v. *Kern*, 218 Fed. 862; 222 Fed. 873.

3. All written instruments forming parts of a single transaction must be read together. It is said in *Bailey* v. *Railroad Company*, 17 Wall. 96, p. 108:

"It is well-settled law that several writings executed between the same parties substantially at the same time and relating to the same subject-matter may be read together as forming parts of one transaction."

This rule was applied to a contract and contemporaneous letters in *Gould* v. *Magnolia Metal Co.*, 108 Ill. App. 203; *Cape Ann Granite Co.* v. *United States*, 20 C. Cls. 1, 15; *Sanborn* v. *United States*, 46 C. Cls. 254, 260; *Pneumatic Gun-Carriage Co.* v. *United States*, 36 C. Cls. 71, 84, 93; *Noel Construction Co.* v. *United States*, 50 C. Cls. 98, 104. The two latter cases follow this court in *Wm. Cramp & Sons Co.* v. *United States*, 216 U. S. 494, 499.

VALIDITY OF CONTRACT SUPPOSED.

If, contrary to the view previously asserted, the transaction of January 13, 1919, Exhibits V and W, rec. pp. 46-55, is contractual, what is the contract?

(a) The United States submitted a contract providing for deliveries to June 1, 1918, at 23.5 per pound.

(b) Appellant agreed with a proviso, rec. p. 55, that "the price lawfully payable in respect to all copper delivered pursuant to the order in question after July 2, 1918, shall remain subject to future agreement between the parties, or to determination by competent authority."

(c) The United States accepted this reservation by receiving and filing the same with the formal contract, by making payments thereunder, and by stating its understanding "that you signed the contract 'under protest.'"

If these actions made any contract, it was a contract for 23.5 cents per pound to June 1, 1918, and for a reasonable price thereafter. What is a reasonable price is determined for purposes of this demurrer by the allegation of the amended petition, par. XIII, record, p. 25, that the price of 26 cents per pound fixed by the War Industries Board after July 2, 1918, was "the fair and just compensation for copper."

An Implied Contract.

If no valid executory contract under Rev. Stat. Sec. 3744, was made, then claimant asserts its right to recover for goods delivered, under the rule laid down in *Clark* v. *United States*, 95 U. S. 539, as follows, p. 542:

> "We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit.*"

See *Salomon* v. *United States*, 19 Wall. 17; *United States* v. *Andrews*, 207 U. S. 229.

The price of 26 cents per pound for copper delivered after July 2, 1918, is the *quantum meruit*. It was fixed by the War Industries Board and is alleged, amended petition par. XIII, p. 25, to be "the fair and just compensation." The price fixed in the order of March 28, 1918, is not the *quantum meruit*. It cannot prevail over the price officially fixed and now alleged to be "fair and just." For this reason, appellant insists upon its claim to 26 cents per pound.

DELAY THE GOVERNMENT'S FAULT.

If it be held, notwithstanding the foregoing, that appellant would be limited to 23.5 cents per pound, if deliveries had been made in accordance with the order of March 28, 1918, Exhibit F, p. 31, we still maintain that it is entitled to 26 cents per pound for deliveries after July 2. This position rests upon the following reasoning:

(a) The parties agreed to the delivery of a certain amount of copper by June 1, 1918.

(b) By failure to give shipping instructions and by diverting available copper to other uses, the government prevented appellant from making deliveries by this date.

(c) On June 1, 1918, appellant had an election, if ordinary rules of law govern this war transaction, to cease delivery or to continue to deliver and charge the additional cost due to the delay.

(d) On July 2, 1918, the market price rose and appellant was damaged to the amount of the rise.

(e) If the legal obligations of the parties were affected by the necessities of the war, the limitation of the supply, its control by the government and the relation between the government, the Copper Producers' Committee and the appellant and are to be measured by the duties of patriotism, the obligation of appellant was to continue deliveries. The corresponding obligation of the government was to pay the extra cost which the rise in price had required appellant to assume.

AN ELECTION TO CLAIM DAMAGES.

Damages for delays caused to a contractor by the acts of the other party have most frequently arisen in the case of building contracts. It has uniformly been held

that a contractor may elect either to stop work for such a breach, where serious, or may complete performance and claim damages.

In *McMaster* v. *New York*, 108 N. Y. 542, there was a breach by the State of a contract for construction. The contractor completed the work, received the contract price and sued for damages. The court said, p. 553:

"The contention that, where there is a breach of contract by one party and the other thereafter is permitted to perform the same in part, receiving the contract price for such part performance, the injured party thereby waives or releases his right to damages for the breach, has no foundation in reason or authority. It is undoubtedly the rule that where one party to a contract breaks the same, the other party may stop and refuse further performance. But instead of doing so he may perform so far as he is permitted and then claim the damages he has suffered from the breach."

This is here treated as a rule of law governing contracts in general.

In *Tobey* v. *Price*, 75 Ill. 645, plaintiffs contracted to furnish defendant with brick work on a building. This could not be done until certain stone and iron work was done by defendant. This was greatly delayed to plaintiffs' damage, who completed their work and sued for damages due to the delay. Defendant urged that plaintiffs should have abandoned the work, but, electing to complete, can claim only the contract price. The court said, p. 647:

"We know of no authority for such a position. Appellees could have abandoned the work and brought their action for damages, but their right to proceed with the work to completion, and then claim damages, cannot be seriously questioned."

This is repeated in *W. H. Stubbings Co.* v. *World's Columbian Exposition Co.*, 110 Ill. App. 210.

In *Kelly* v. *United States*, 31 C. Cls. 361, where, through the failure of the other party to procure a building site according to the contract, the contractor lost time and had to purchase material at an increased price, he was allowed to recover the difference in price of the materials and the value of his services for the time lost. The court there recognized the election, saying, p. 375:

"Had the claimants so elected, they might, after the defendants' failure within a reasonable time to make ready the site for the building, have rescinded the contract and recovered the value of the services actually performed as upon a *quantum meruit*."

In *Moore* v. *United States*, 46 C. Cls. 139, the court said, p. 178:

"As a result of this violation of the contract on the part of the government, the contractors were compelled to give up some of the contracts which they had made for the supply of stone for the dock. In the meantime the price of labor steadily advanced, and by the time inspection of stone began, and the contractors could renew their contracts for stone, they were compelled to do so at much greater cost.

"We think the claimants clearly entitled to recover for this increase in the cost of stone caused by the delay of the defendants."

See the same rule asserted in *Roettinger* v. *United States*, 26 C. Cls. 391, 410.

The principle is one of general application in the law of contracts and is equally applicable to contracts of sale. It was applied in *Garfield &c. Co.* v. *Fitchburg R. R.*, 166 Mass. 119, to a case arising under a contract for

sale and delivery of coal. This was delivered by plaintiff to defendant in vessels and defendant was recognized to be under an implied obligation to discharge these vessels within a reasonable time. Defendant delayed discharge and plaintiff was damaged by the delay. It was held that, although plaintiff might after a reasonable time have taken its vessels away and discharged them elsewhere, it did not lose its right to damages by allowing defendant to discharge them after the reasonable time had expired. The court said, p. 123:

"But a contractor, by taking what he can get under his contract when he can get it, no more necessarily and as matter of law waives a claim for damages for failure to perform on time than he necessarily waives a defect of quality by accepting goods."

Cases under the law of sales must be rare, where the circumstances are like these, when deliveries on a rising market were delayed by the buyer and the seller continued to deliver. The rule under normal circumstances has been to stop deliveries. This is illustrated in such a case as *Louisville &c. R. R. Co. v. Diamond State Iron Co.*, 126 Ill. 294, where the contract was to deliver goods, shipping orders to be given by buyer. It was held that buyer's failure to give such orders was a sufficient excuse for nondelivery. See also Benjamin on Sales, Am. ed., 1888, p. 635.

The converse of the principle above urged, is stated in 2 Williston Contracts, Sec. 704, that the buyer may sue for delay in performance, the author saying, p. 1355:

"Lord Blackburn in his treatise on the Law of Sales says:

" 'The vendee may accept the goods and bring his action for any damages he may have actually suffered in

consequence of the late delivery. He does not by accepting the late delivery waive any claim he may have for damages arising from the delay.' "

In *Merrimack Mfg. Co.* v. *Quintard*, 107 Mass. 127, a contractor for delivering coal delayed its deliveries beyond the contract term to a period of higher freight rates. Plaintiff accepted the coal subject to its claim for the difference paid by it for freight. It was held entitled to recover.

In *Clydebank Co.* v. *Yzquierdo*, 1905 Appeal Cases, 6, vessels were delivered after the contract date of completion. Liquidated damages were stipulated for delay. Payment was made without deduction of, or claim for, such damages. It was held that there was no waiver either by receipt of the vessel or payment of the contract price and that the suit would lie.

In *Hipwell* v. *Knight* (1 Younge & Collyer, Eq. Exch. 401, 416), Baron Alderson, discussing cases in which time is or is not of the essence of the contract, concludes:

"If, therefore, the thing sold be of greater or less value, according to the effluxion of time, it is manifest that time is of the essence of the contract, and a stipulation as to time must then be literally complied with in equity as well as in law. The cases of the sale of stock and of a reversion, are instances of this."

The Supreme Court of Illinois held *Wilson* v. *Roots*, 119 Ill. 379, 392:

"It is true that, in general, time is not, unless so declared by the parties, of the essence of the contract; but the rule has exceptions, as, if the thing sold be of greater or less value, according to the effluxion of time, it is manifest that time is of the essence of the contract."

In the court below, *St. Louis Hay & Grain Co.* v. *United States,* 191 U. S. 159, was cited by defendants. There this court distinctly declared, p. 164, that the extended deliveries were within the period fixed by the contract and that the United States was not at fault. Here the facts showing the responsibility of the United States are averred and are admitted by the demurrer.

If appellant had an election on June 1, 1918, to stop further deliveries, it had an equal right to continue and claim damages.

THE WAR CONDITIONS.

Under the war conditions, it was the duty of patriotism to continue. Legal obligation should keep pace with such duty. Appellant knew that the rest of the copper was needed after June 1, 1918, as shipping instructions were received. The organization of the industry, by arrangement with the government, was such that appellant was the only practicable channel for foreign shipments, amended petition, pars. III and IV, pp. 15-17; Appendix No. 1, *post,* p. 37. Refusal to deliver would have caused confusion and delay when promptness was imperative. The law must be construed in reference to these imperative conditions. Whatever the right of election in peace, the obligation in war was to respond to the government's needs, to continue deliveries and to rely upon the courts for protection.

Even if the election existed to stop deliveries, appellant should not be in a less favorable position because it continued. The imperative call of the public welfare must answer the objection that appellant lost any of its rights by meeting the needs of the government.

Cases adjudicated since the war show that the courts have treated the war conditions as profoundly modifying ordinary obligations. In *Roxford Knitting Co.* v. *Moore*, 265 Fed. 177, cited, *ante*, p. 15, a contract with the government for military supplies in an industry officially mobilized for national needs was held to relieve the manufacturer from the obligations of prior contracts. In *Ross Lumber Co.* v. *Hughes Lumber Co.*, 264 Fed. 757, C. C. A., 5th Cir., it was held that a contract for sale of lumber at market prices could not be enforced after the government had fixed a maximum price. In *Texas Co.* v. *Hogarth Shipping Co.*, 265 Fed. 375; affirmed by C. C. A., 2d Cir., 267 Fed. 1023, it was held that a requisition of a foreign vessel by its government relieved the owner from a suit for damages under a prior charter.

An Informal Contract.

Appellant, beside the relief to which it is entitled upon a *quantum meruit* for goods actually delivered, is equally entitled to the benefit of the Dent Act of March 2, 1919, *post*, p. 60. Congress recognized by this act that there would be many agreements "not executed in the manner prescribed by law" and therefore gave authority to the Secretary of War to settle and adjust such agreements. If this transaction was an agreement rather than an order, it is within this act because it was not executed as required by Rev. Stat. Sec. 3744.

In directing the settlement of agreements, Congress in this act made two departures from the strict rules of legal right existing under formal contracts: one in favor of the contractors—that the settlements should be "upon a fair and equitable basis," and one in favor of the United States,—that there should be no allowance for

prospective profits. By the former provision, the Secretary of War could be relieved from the enforcement of harsh rules of law which would result in injustice; by the latter, contractors were deprived of what under a valid contract is declared by this court to be "part and parcel of the contract itself," *United States* v. *Behan,* 110 U. S. 338, 344.

All the powers to be exercised by the Secretary of War under Sec. 1 of this act are to be exercised by the Court of Claims under Sec. 2. Such cases are subject to appeal to this court under Judicial Code, Sec. 242, formerly Rev. Stat. Sec. 707, *Ex parte Zellner,* 9 Wall. 244; *Vigo's Case,* 21 Wall. 648; *United States* v. *Irwin,* 127 U. S. 125.

FAIR AND EQUITABLE BASIS.

What is a fair and equitable basis for settlement in this case? The contractor agreed to furnish 30,000 tons of copper by June 1, 1918. It had therefore been represented to the United States by appellant's associate, the United Metals Selling Company, record, near top p. 28, that the price of 23.5 cents per pound would be unsatisfactory after that date. Appellant repeatedly objected to furnishing copper after that date at the price fixed in the informal agreement. Its only agreement was to furnish copper to that date. It was prevented by the United States from furnishing this copper by that date. It was at liberty to stop delivering copper at that date. Because of the government's war needs, it continued to furnish the copper, although this price was no longer "fair and just compensation."

Congress has directed a settlement "upon a fair and equitable basis." It is unnecessary to define the full extent of these words to apply them to this case. They

mean at the very least that the rules of law applicable to the case shall be construed liberally in favor of substantial justice to both parties. Appellant therefore asks this court to recognize the "fair and equitable" principle that it should be paid a fair price for what it furnished after its contract obligation to furnish at a lower price had ceased by the government's fault. This is no more, as already shown, than the application to this case of principles of law repeatedly declared by the courts.

The ultimate equity in this case is that a judgment for appellant would result in its receiving an admittedly fair price for copper at the date when it was delivered, instead of a price which was reasonable at an earlier date, when appellant was prepared to deliver it and would have delivered it, except for the acts of the United States.

CONCLUSION.

It is respectfully submitted that this judgment should be reversed because:

1. This copper was furnished under a commandeering order issued by authority of the act of June 3, 1916, which provides payment of a "fair and just" compensation. For deliveries after July 2, 1918, such compensation is the sum claimed.

2. Claimant's right of action under implied contract, if such exists, is on a *quantum valebat* for goods delivered under order. The fair value of the copper delivered after July 2, 1918, is the sum claimed.

3. Claimant's only agreement with the United States was to deliver copper up to June 1, 1918. Deliveries were not concluded by that date because appellant was prevented by acts of the United States. It should be paid the losses sustained by it on later deliveries, arising out

of the advance in value of copper after July 2, 1918, to the sum claimed.

4. In time of peace, appellant might on June 1, 1918, have refused further deliveries and saved itself from loss. In time of war patriotic duty, as well as legal obligation, compelled it to continue deliveries and rely upon subsequent judicial relief. It should not suffer for doing its duty to the country.

5. Under the act of March 2, 1919, appellant is entitled to settlement upon "a fair and equitable basis." Fairness and equity demand that it should be paid the value at date of delivery, since the delivery in a period of higher prices was caused by the acts of the United States.

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APPENDIX NO. 1.

EXTRACT FROM OFFICIAL REPORT OF WAR INDUSTRIES BOARD TO THE PRESIDENT,

by

Bernard M. Baruch, Chairman.

Government Printing Office, 1921.

Part II, p. 130.

CHAPTER 3.

COPPER AND BRASS.

COPPER.

Second only to steel in its importance, as a basic metal required for war, is copper. And in the spring of 1917 the copper market pointed just as unerringly as that of steel to the necessity for some kind of Government control. Electrolytic copper sold around 16 cents a pound before 1914. It was selling at 35.74 cents in March, 1917. The rise had been steady except during the short period in 1916 when an early peace seemed probable.

This country controls the bulk of the copper in the world. Demand, due to war requirements of the Allies, was far outrunning supply for two years before we entered the conflict. And it was evident that the situation would grow steadily worse as our participation in the war was enlarged. Maximum production was of extreme importance. Thus it was that copper became one of the first problems to engage the attention of Mr. Baruch when he came to Washington early in March, 1917, to take charge of raw materials as a member of the advisory commission of the Council of National Defense.

There were two schools of thought touching the question. The one argued that, as increase of production was the essential factor, the rise in prices should not be interfered with, but the accumulation of undue profits should be taken care of through excess profit taxes; the

other, which included Messrs. Summers, Meyer, and Baruch, believed that there was a limit to which high prices would be effective in stimulating production, and that, if advances in this and other commodities were allowed to take their course, not only would the readjustments incident to peace bring catastrophe with them, but it would also be next to impossible to finance the war. They believed that control over prices and excess profit taxes were both necessary.

Their first action was an appeal to the large producing and smelting interests direct. This appeal resulted, on March 20, 1917, in an understanding by which the Army and Navy were enabled to purchase their requirements, estimated at that time to be 45,510,000 pounds, to be delivered quarterly for a year, at 16.6739 cents a pound. This represented the actual average selling price obtained by the United Metals Selling Co. over a period of 10 years, 1907 to 1916. The market quotations for that date were 35.74 cents per pound, and sales were being made as high as 37 cents. The copper industry was the first one to come forward with its offer in the industrial preparedness campaign. This early offer of the copper trade, followed rapidly as it was by several other trades, to sell to their own Government its war needs at prewar prices had an important psychological effect upon prices generally. Eugene Meyer, Jr., originally proposed the arrangement, and it was Daniel Guggenheim and John D. Ryan who brought about the agreement on the side of the copper trade. Market prices began to decline from this date, but they did not fall rapidly.

Meanwhile war broke out and the increasing copper requirements found the market with scarcely enough copper to meet contract needs, even by calling reserve stocks into use, watching supplies, and carefully conserving every pound. The necessity for stimulating increased production seemed paramount. The Federal Trade Commission was asked to examine into the current costs of production.

Another order for 60,000,000 pounds was placed on June 27 by the War Department for early delivery, with

the open market standing at the time at 32.57 cents. After much discussion the price determination was left until the Federal Trade Commission should report on costs. Shortly afterward the Secretary of the Navy announced that he would pay down for Navy copper 75 per cent of 25 cents a pound, leaving the other 25 per cent for adjustment when the cost of production should have been determined.

The announcement of this policy, which was interpreted in some quarters as the price the Government intended to fix, gave concern to the markets. Strikes or threatened strikes at the mines in Arizona pointed to serious curtailment of production. The miners were being paid on a sliding wage scale, adjusted to the price of copper.[1] Their wages were based on 27-cent copper at this time. They threatened to strike if these wages should be reduced, and did strike wherever they were reduced.

The producers continued to supply copper to the Government, but refused to bill it at 18¾ cents. The indebtedness of the Government to producers soon ran into millions of dollars. Refiners were short of blister and were running at only 60 to 75 per cent capacity, but the curtailment was not due to the delayed payments.

In the meantime the War Industries Board, upon which were representatives of the Army and Navy, had been created and in its examination of price problems became convinced that 18¾ cents would curtail produc-

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[1] These sliding scales provide for the minimum wages of $3.50 per day of eight hours for miners and men employed underground, and $4.50 for mechanics, with many higher classifications where skilled labor is necessary; the minimum to apply when copper sells below 15 cents per pound, and 25 cents additional per day to every man employed to be paid for each 2-cents advance in the price of copper above 15 cents. The result had been that for over a year wages were based on a price of copper at 27 cents and above, so that miners were receiving $5 to $5.25 per day, and all mechanics $6.25 to $6.50 per day.

tion. The Board agreed to advance 22½ cents to the producers and to leave the difference between 22½ cents and 25 cents to the findings of the Federal Trade Commission.

The demands of the Allies were an equally important consideration at this time. During 1916 England and France had purchased over 660,000,000 pounds of copper in the United States in blocks so large as to be featured in the trade news. In September, 1916, 448,000,000 pounds were purchased at 27 cents. This had reduced stocks everywhere to lowest level and caused a highly speculative market. While their purchases in the spring of 1917 were in less dramatic quantities, they still continued to take such copper as they could secure.

In August, while the discussion of prices and production was at its height, it was officially made known to the War Industries Board that the French and British were in the market for 60,000,000 pounds. The Board decided to call the producers into conference and, bearing in mind their firm offer to the Government of copper for 25 cents per pound, make them a tentative offer of 20 cents for this quantity. This offer was made at a meeting on August 7, but it was agreed that the price should be subject to revision, upward or downward, later.[2] After the representatives of the trade withdrew from the meeting, it was moved that if the copper producers refused to enter into this agreement the Government would proceed to commandeer the necessary supply. When the joint meeting was resumed it appeared that the opposition of the industry to the 20 cents, and indeed to sales at a memorandum price at all, was very determined, and the arguments in support of the opposition seemed worthy of most serious consideration. On August 8 the Board passed the following resolution:

> That as the copper emergency requires immediate action necessary to secure a supply for our Government and our allies, the Board endeavor to

[2] See War Industries Board Minute Book, Aug. 7, 1917.

> secure from the copper interests the needs of ourselves and our allies at a price to be fixed when we shall see the report of the Federal Trade Commission as to the costs and for purposes of payment on account of deliveries, a tentative price of 22½ cents to be fixed with the understanding that this price shall in no way be taken into consideration when the final price is to be determined.

The result of the controversy was that on August 16, 1917, the copper interests agreed to deliver 77,000,000 pounds to the Allies on a memorandum, no price to be paid pending the final fixing of a price after an investigation.

By September 5, 1917, the Federal Trade Commission had made its report on costs of producing copper, the War Industries Board had studied it, and at a meeting that day reached a conclusion to fix the price of electrolytic copper at 22 cents per pound.

In order to acquaint the copper interests with the position of the Board, to try to reach an agreement with them, and to secure their cooperation, their representatives were called to Washington on September 11. The representatives were told that the Board believed that 22 cents per pound f. o. b. New York for refined electrolytic copper, 99.93 per cent pure, was a fair price and would allow the producers a reasonable profit. They were told that the price should hold for a certain period only, and could then be revised upward or downward; further, that it was to be applicable alike to the Government, the Allies, and the public, and that wages to labor should remain the same notwithstanding the sliding scale agreement.

The industry objected. Their position was presented orally at the meeting, and three days later by a long memorandum. They declared flatly that the copper interests could not control the price to the public at a point much below 25 cents, and that, if the Government fixed 22 cents as the price, the small high-cost producers would not voluntarily cooperate in selling at the fixed price. They pointed out that acute labor troubles would result

should the sliding scale of rates be disturbed. They showed how impracticable it would be for the Government to commandeer the numerous small high-cost mines. They gave evidence to show that if 22 cents were finally fixed it would be impossible to obtain the cooperation of the majority of mine owners. The difficulty was not with the large producers, in whose hands, of course, the bulk of the business is concentrated, but the copper industry also embraces a large number of smaller high-cost producers, whose product was also needed in the extraordinary emergency. Everybody agreed that the considerable output of the small high-cost producers was indispensable.

The copper interests pointed out with particular care the important bearing of wages on copper prices. It is true that there are few raw materials of which so large a percentage of the cost of production goes to pay wages. They pointed out that the average wages of all men in the copper industry had been advanced 50 per cent over those of 1915, and that they could not be lowered without serious consequences. Labor shortage and labor unrest might easily make it necessary to raise them. If wages were to be maintained, the small plants could not keep open on a selling price of less than 25 cents. Their memorandum contained the following proposal:

> While some of the low-cost producers will show a large profit at 25 cents, some of the largest and practically all of the small producers can not show more than the usual peace-time profit at that price, and if depletion of mines is considered, their profit would probably be less than in normal times at average prices. We believe that it would be to the interest of the Government to pay 25 cents per pound and to take all of the production of all of the mines of the country at that price, retaining all the copper which is needed for this Government and for its Allies, and selling the balance at the same price, or approximately the same price, to the public.

Following the conference in Washington of Septem-

ber 11 the leading copper producers met in New York on September 14 and voted to propose to the War Industries Board a compromise price of 23½ cents. In their communication they said:

> With one exception those present agreed that if your committee would unanimously recommend a price of 23½ cents * * * we would still be able to get the practical result that we are aiming for, that is, pretty nearly maximum production; therefore, I would say that if your committee would agree to 23½ cents we can pledge the copper industry almost as a whole to use every possible means to secure a maximum production and to maintain the present scale of wages, and I am satisfied we can succeed.

On September 21, 1917, the price of 23½ cents was definitely fixed in the form of an agreement between the Government and the producers. It was approved by the President, subject to revision after four months; the short period being established for the purpose of allowing any producer, consumer, or other interested party to appear and present reasons, if any, for increasing or decreasing the price. It is interesting in this connection to note that while many producers appeared with arguments urging increases, no consumer, public or private, nor official of our own or other Government, appeared to object to the prices as too high. The fact is the fixed price of copper represented a smaller advance over prewar normal than that of perhaps any other commodity. This was the first negotiated price-fixing arrangement ever established by the United States Government. As part of the agreement the producers pledged themselves not to reduce wages; to sell their products to the Allies and the general public at the same price as that to be paid by the Government; to exert every effort to maintain maximum production during the war; and to take the necessary measures to prevent copper from falling into the hands of speculators. The Army, Navy, and other

Government agencies interested in the purchase of copper participated in the negotiations.

The industry, though dissatisfied, had finally acceded. They believed that at least it gave them a definite program and would bring stability. But within a week many questions began to arise as to how the new scheme was to be administered. This was a new kind of undertaking both for the Government and the industry.[3]

A letter of inquiry was addressed to the Board October 19, 1917, and its prompt answer contained the Government's solution of several of the most important problems.

(1) That all outstanding bona fide contracts between producers and consumers might be consummated at contract prices. Some of these were at 27 cents a pound. But under the priority agreement our Government had first call and the Allies second, and as these two purchasers consumed nearly all the supply, few high-priced orders could be filled.

(2) The rule was laid down that all contract sales made for delivery after the expiration of the present fixed price (Jan. 21, 1918) should be made at a price subject to any revision which the Board might see fit later to make.

(3) In answer to the complaint that outside dealers and brokers were trading and quoting at 28, 29, and 30 cents for copper, a control committee or selling agency was established, which by buying and selling at the fixed price was designed to crowd the speculators from the market.

(4) It was urged that differentials be established for

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[3] The Wall Street Journal of Sept. 27, 1917, said in this connection: "Both producers and consumers are 'up in the air' due to lack of details in connection with carrying out of the proposed plans for handling the copper market, and this condition will continue until Washington furnishes more detailed advices as to what can be done and what should not be attempted under the new order of things."

modifications from electrolytic copper, and particularly that prices for scrap be fixed. But it was ruled that no other prices would be fixed.

The price of 23½ cents was continued until July 2, 1918, when it was increased to 26 cents and remained at that figure until control ceased. By the spring of 1918, many complaints of hardship were coming to the Board from the numerous small high-cost producers. The Government was requiring about 93 per cent of the output at this time, 49 per cent being consumed by the United States and 44 per cent by the Allies.

Maximum production was absolutely required and the Government could afford to take no risk of causing a reduction. The price-fixing committee voted on May 22, 1918, to continue the 23½ cents until August 15. But a few days later, when evidence had been shown them of advances in freight rates and increases and prospective increases in costs of labor, which were making the smaller producers run at such great loss that they would have to close down; the committee voted that the price should be raised to 26 cents on July 2.[4] A committee, formed to represent 15 of the smaller companies, presented the case at Washington.

The fixing of copper prices, as was the case of steel, brought with it the necessity of control in other directions. Control over the distribution of copper was far less difficult than that of steel. While civilian uses of copper are very numerous and very important, they are not nearly so indispensable, particularly for a short period, as are those of iron and steel. The war required over 90 per cent of the copper which we could produce. This simply meant that civilian use had to be practically suspended, and this was accomplished not so much by priority control in the sense in which that process was used on steel; but it was accomplished through the purchase by the War Department of a high percentage of

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[4] The cost sheets of the smelting and refining companies showed losses. One and a half cents of the advance went to smelters and refiners, one cent to producers.

the copper and its distribution to the manufacturers of armaments as they needed it.

The principal responsibility of the Board, after the market had once been stabilized, was to watch over production and take care that it was not diminished; to guard against speculation; and to keep the small producers encouraged to continue their furnaces. The copper producers' committee, at the direction of the Board, allocated the various orders.

In October, 1917, Eugene Meyer, jr., was placed in charge of the Board's section on nonferrous metals. He gave particular attention to the problem of maintaining adequate production and the proper distribution of copper, but did not take part in the price fixing. He remained in this position until March, 1918, when he became a director in the War Finance Corporation, and Pope Yeatman succeeded him and remained chief until the end.

A word of explanation of the copper producing industry may make this story more clear. In the first stages of production copper-bearing ores are smelted, the metals being reduced and segregated from the nonmetals in a product known as "blister copper." Frequently associated with the copper are gold, silver, nickel, platinum, selenium, and other metals. They all occur in the blister. The electrical conductivity of copper is diminished by the presence of other metals. Therefore, in order to purify the blister and to recover the gold, silver, and nickel the crude or blister copper is refined by the electrolytic process, and the product is the electrolytic copper of commerce which runs 99.93 per cent pure. When, however, the blister copper carries a negligible quantity of the more precious metals, it is usually refined by the furnace method, and this less pure product is known as casting copper, and is sold a little below the pure grades. Pig copper is produced in one smelting operation from ores which are free from precious metals. "Lake copper" is a product which comes from the Lake Superior districts where native metallic copper occurs almost free from other elements. It is crushed and refined by the furnace method.

The production of copper in the United States increased about 51 per cent between 1913 and the end of the war. In 1917 it was 2,428,000,000 pounds of new copper. Lake producers increased their output. A number of new deposits were discovered, but the most important cause of increase was expansion and improvement in equipment and processes at established properties. Several new smelting plants, concentrating plants, and refineries were put into operation, while many more were remodeled for the purpose of installing newly developed processes and equipment.

There was a 100 per cent increase in the production of recovered copper, the 1918 output being a half billion pounds. This metal is derived by remelting and refining furnace ashes and cinders, scrap composed of clippings, punchings, borings, etc., and from discarded articles. Recovered copper can be refined electrolytically and made equal to the virgin product. Copper alloys, like brass, when recovered, need not be reduced to the separate metals, but can be brought up to specifications by a suitable admixture of new metals in the process of refining.

Despite many hardships and obstacles, the American copper producers played their part and contributed to the successful prosecution of the war in a way second to no other industry. There are ample grounds for the belief that the prices fixed by the Government worked hardship on many operators; and to add to the distress, the signing of the armistice on November 11 left them, like producers of other raw materials, with very large stocks on hand, produced at the highest costs in the history of the trade, and with no large orders booked.

APPENDIX NO. 2.

OFFICIAL BULLETIN PUBLISHED DAILY UNDER ORDER OF THE PRESIDENT BY THE COMMITTEE ON PUBLIC INFORMATION,

George Creel, Chairman.

[*Note:* The following authorities sanction judicial notice of public documents: *Romero* v. *United States,* 1 Wall. 721, syllabus, paragraph 1, Mexican archives; *Jones* v. *United States,* 137 U. S. 202, 216, 217, State Department order taking possession of an island; *Knight* v. *U. S. Land Association,* 142 U. S. 161, top p. 169, Records of Interior Department; *Caha* v. *United States,* 152 U. S. 211, 222, Departmental Land Regulations; *New York Indians,* 170 U. S. 1, 32, Public Records relating to Indian Lands. "The Federal courts will take judicial notice of official statements of the heads of the executive departments, such as the War Department." *United States* v. *Brewer-Elliott Oil and Gas Company,* 249 Fed. 609, 610; par. 15 of syllabus.]

Vol. 1 *Washington, Thursday, May 10, 1917* No. 1

Official Bulletin Will Give Public Detailed War News.

The Official Bulletin, of which this is the first issue, is designed to inform the public on the progress of the war and of official acts incident to its prosecution. It will be published daily by the Committee on Public Information.

This committee, consisting of the Secretaries of State, War, and Navy, with George Creel as the civilian chairman, was recently designated by President Wilson to inform the country as fully as military exigencies will permit on all subjects relating to the war.

It is proposed to present in its columns all proclamations and Executive orders issued by the President; rules and regulations promulgated by the Federal departments;

official bulletins and statements; statutes bearing on the war and their construction, and all other subjects related to the prosecution of the war, to which publicity may properly be given.

The BULLETIN will be distributed without cost to public officials, newspapers, and agencies of a public or semipublic character equipped to disseminate the official information it will contain. It will be conspicuously posted in all post offices, and the committee urges all libraries and other public or semipublic institutions receiving this publication to make it available to the public whenever possible.

Official Bulletin of September 21, 1917, p. 1.

AGREEMENT FIXING COPPER PRICE 23½ CENTS POUND ANNOUNCED.

President Approved Compact Made by War Industries Board with Producers—Present Wages Not to be Reduced and Cost to Allies Will be Same as to the U. S.

After investigation by the Federal Trade Commission as to the cost of producing copper, the President has approved an agreement made by the War Industries Board with the copper producers fixing a price of 23½ cents per pound, f. o. b. New York, subject to revision after four months. Three important conditions were imposed by the Board: First, that the producers would not reduce the wages now being paid; second, that the operators would sell to the allies and to the public copper at the same price paid by the Government, and take the necessary measures, under the direction of the War Industries Board, for the distribution of the copper, to prevent it from falling into the hands of speculators who would increase the price to the public; and, third, that the operators pledge themselves to exert every effort necessary to keep up the production of copper to the maximum of the past so long as the war lasts.

The War Industries Board felt that the maintenance

of the largest production should be assured, and that a reduction in wages should be avoided. The stipulation that present wages shall not be reduced compels the maintenance of the highest wages ever paid in the industry, which without such stipulation would, with the reduction made in the price of copper, be reduced under the sliding scale so long in effect in the copper mines. Within this year copper has sold as high as 36 cents per pound, and the market price would now be higher than it is had it not been well known for some weeks that the Government would fix the price.

The principal copper producers throughout the country have evinced an admirable spirit, and for weeks have promptly supplied every request of the Government for copper without awaiting decision as to price and agreeing to accept the price which the board should ultimately fix. The proper departments of the Government will be asked to take over the mines and plants of any producers who fail to conform to the arrangement and price, if any such there should be.

Official Bulletin of January 23, 1918, p. 4.

Extension of Copper Price Approved by the President.

The President has approved the recommendation of the War Industries Board that the maximum price for copper fixed upon its recommendation by the President, and announced September 21, 1917, be continued in effect upon the same conditions until June 1, 1918. That is to say, the maximum price to be 23½ cents per pound f. o. b. New York, subject to revision after June 1, 1918, upon the conditions, first, that the producers will not reduce the wages now being paid; second, that the producers will sell to the allies and to the public copper at the same price paid by the Government, and take the necessary measures under the direction of the War Industries Board for the distribution of the copper to prevent it from falling into the hands of speculators who

would increase the price to the public; and third, that the producers pledge themselves to exert every effort necessary to keep up the production of copper to the maximum of the past, so long as the war lasts.

Official Bulletin of March 6, 1918, pp. 1, 5.

REORGANIZATION OF WAR INDUSTRIES BOARD, WITH MR. BERNARD M. BARUCH, CHAIRMAN, ANNOUNCED BY PRESIDENT.

Its Functions Outlined.

Letter Written by Mr. Wilson to New Head of Board is Made Public—Chairman's Duties Are Set Forth. Committee to Aid in Fixing Prices.

The President yesterday announced the reorganization of the War Industries Board under the chairmanship of Mr. Bernard M. Baruch.

It was announced at the same time that Judge Robert S. Lovett, who has done such admirable work as the priorities member of the War Industries Board, has consented to take charge of the railroad improvement work, which the Director General of Railways has decided to put upon the best and most effective footing possible.

Letter to Mr. Baruch.

The reorganization of the War Industries Board was outlined by the President in the following letter to Mr. Baruch:

The White House,
Washington, March 4, 1918.

My Dear Mr. Baruch:—I am writing to ask if you will not accept appointment as chairman of the War Industries Board and I am going to take the liberty at the same time of outlining the functions, the constitution and action of the board as I think they should now be established.

The functions of the board should be:

(1) The creation of new facilities and the disclosing, if necessary the opening up, of new or additional sources of supply.

(2) The conversion of existing facilities, where necessary, to new uses.

(3) The studious conservation of resources and facilities by scientific, commercial, and industrial economies.

(4) Advice to the several purchasing agencies of the Government with regard to the prices to be paid.

(5) The determination, wherever necessary, of priorities of production and of delivery and of the proportions of any given article to be made immediately accessible to the several purchasing agencies when the supply of that article is insufficient, either temporarily or permanently.

(6) The making of purchases for the allies.

Final Decisions by Chairman.

The board should be constituted as at present and should retain, so far as necessary and so far as consistent with the character and purposes of the reorganization, its present advisory agencies; but the ultimate decision of all questions, except the determination of prices, should rest always with the chairman, the other members acting in a cooperative and advisory capacity. The further organization of advice I will indicate below.

In the determination of priorities of production, when it is not possible to have the full supply of any article that is needed produced at once, the chairman should be assisted, and so far as practicable, guided by the present priorities organization or its equivalent.

Priorities of Delivery.

In the determination of priorities of delivery when they must be delivered, he should be assisted when necessary, in addition to the present advisory priorities organization, by the advice and cooperation of a commit-

tee constituted for the purpose and consisting of official representatives of the Food Administration, the Fuel Administration, the Railway Administration, the Shipping Board and the War Trade Board, in order that when a priority of delivery has been determined there may be common, consistent, and concerted action to carry it into effect.

In the determination of prices the chairman should be governed by the advice of a committee consisting besides himself, of the members of the board immediately charged with the study of raw materials and of manufactured products, of the labor member of the board; of the chairman of the Federal Trade Commission, the chairman of the Tariff Commission, and the Fuel Administration.

The chairman should be constantly and systematically informed of all contracts, purchases, and deliveries, in order that he may have always before him a schematized analysis of the progress of business in the several supply divisions of the Government in all departments.

The duties of the chairman are:

(1) To act for the joint and several benefit of all the supply departments of the Government;

(2) To let alone what is being successfully done and interfere as little as possible with the present normal processes of purchase and delivery in the several departments;

(3) To guide and assist wherever the need for guidance or assistance may be revealed: For example in the allocation of contracts, in obtaining access to materials in any way preempted, or in the disclosure of sources of supply;

(4) To determine what is to be done where there is any competitive or other conflict of interest between departments in the matter of supplies: For example, when there is not a sufficient immediate supply for all and there must be a decision as to priority of need or delivery, or when there is competition for the same source of manufacture or supply or when contracts have not been placed in such a way as to get advantage of the full productive capacity of the country;

(5) To see that contracts and deliveries are followed up where such assistance as is indicated under (3) and (4) above has proved to be necessary:

(6) To anticipate the prospective needs of the several supply departments of the Government and their feasible adjustment to the industry to the country as far in advance as possible, in order that as definite an outlook and opportunity for planning as possible may be afforded the business men of the country.

In brief, he should act as the general eye of all supply departments in the field of industry.

Cordially and sincerely yours,

WOODROW WILSON.

Official Bulletin, May 31, 1918, p. 1.

PRESIDENT'S ORDER MAKING WAR INDUSTRIES BOARD AN EXECUTIVE AGENCY.

Executive Order.

I hereby establish the War Industries Board as a separate administrative agency to act for me and under my direction. This is the board which was originally formed by, and subsidiary to, the Council of National Defense under the provisions of "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916.

The functions, duties and powers of the War Industries Board, as outlined in my letter of March 4, 1918, to Bernard M. Baruch, Esq., its chairman, shall be and hereby are continued in full force and effect.

WOODROW WILSON.

The White House,
May 28, 1918.

Official Bulletin, July 3, 1918, p. 5.

PRICE OF COPPER IS ADVANCED BY WAR INDUSTRIES BOARD.

The War Industries Board authorizes the following:

Subject to the approval of the President, the price-fixing committee of the War Industries Board, in conference with representatives of the industry, today (July 2) fixed the price of copper at 26 cents per pound, an advance from 23½ cents, the price formerly fixed.

The new price goes into effect today (July 2) and will continue until August 15.

Official Bulletin of July 5, 1918, p. 4.

CONDITIONS OF NEW AGREEMENT ON MAXIMUM PRICE FOR COPPER.

The War Industries Board authorizes the following:

The President has approved an agreement made between the producers of copper and the price-fixing committee of the War Industries Board (after investigation by this committee in conjunction with the Federal Trade Commission as to the cost of production), that the maximum price on copper shall be 26 cents per pound, taking effect July 2, but subject to revision after August 15, f. o. b. cars or lighters at refinery if shipped from eastern refineries, and f. o. b. New York if shipped from western refineries, subject to the additional charges on copper shapes approved by the price-fixing committee on June 5, 1918.

The Conditions.

The conditions are: First, that the producers of copper will not reduce the wages now being paid; second, that they will sell to the United States Government, to the public in the United States, and to the allied Gov-

ernment at not above the maximum price; third, that they will take the necessary measures, under the direction of the War Industries Board, for the distribution of copper to prevent it from falling into the hands of speculators, who might increase the price to the public; and fourth, that they will pledge themselves to exert every effort necessary to keep up the production of copper so as to insure an adequate supply so long as the war lasts.

APPENDIX NO. 3.

STATUTES.

Revised Statutes, Sec. 3744.

It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return.

Revised Statutes, Sec. 3709.

All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when

the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

National Defense Act, June 3, 1916, 39 Stat. 166, 213.

CHAP. 134. An act For making further and more effectual provision for the national defense, and for other purposes.

SEC. 120. PURCHASE OR PROCUREMENT OF MILITARY SUPPLIES IN TIME OF ACTUAL OR IMMINENT WAR.—The President, in time of war or when war is imminent, is empowered through the head of any department of the government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or materials shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry, or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry; and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manu-

facturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War, shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any Department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding $50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just.

Approved, June 3, 1916.

Overman Act of May 20, 1918, 40 Stat. 556, 557.

Chap. 78. An Act Authorizing the President to coordinate or consolidate executive bureaus, agencies, and

offices, and for other purposes, in the interest of economy and the more efficient concentration of the Government.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this Act, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute a public record: *Provided,* That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace, or at such earlier time as the President may designate: *Provided further,* That the termination of this Act shall not affect any act done or any right or obligation accruing or accrued pursuant to this Act and during the time that this Act is in force: *Provided further,* That the authority by this Act granted shall be exercised only in matters relating to the conduct of the present war.

SEC. 2. That in carrying out the purposes of this Act the President is authorized to utilize, co-ordinate, or consolidate any executive or administrative commissions, bureaus, agencies, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the

whole or any part of the records and public property belonging thereto.

SEC. 3. That the President is further authorized to establish an executive agency which may exercise such jurisdiction and control over the production of aeroplanes, aeroplane engines, and aircraft equipment as in his judgment may be advantageous; and, further, to transfer to such agency, for its use, all or any moneys heretofore appropriated for the production of aeroplanes, aeroplane engines, and aircraft equipment.

SEC. 4. That for the purpose of carrying out the provisions of this Act, any moneys heretofore and hereafter appropriated for the use of any executive department, commission, bureau, agency, office, or officer shall be expended only for the purposes for which it was appropriated under the direction of such other agency as may be directed by the President hereunder to perform and execute said function.

SEC. 5. That should the President, in redistributing the functions among the executive agencies as provided in this Act, conclude that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper.

SEC. 6. That all laws or parts of laws conflicting with the provisions of this Act are to the extent of such conflict suspended while this Act is in force.

Upon the termination of this Act all executive or administrative agencies, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this Act to the contrary notwithstanding.

Approved, May 20, 1918.

Dent Act of March 2, 1919, 40 Stat. 1272, 1273.

CHAP. 94. An Act To provide relief in cases of contracts connected with the prosecution of the war, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November 12, 1918, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials, or supplies or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November 12, 1918, and such agreement has not been executed in the manner prescribed by law: *Provided*, That in no case shall any award either by the Secretary of War, or the Court of Claims include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: *Provided further*, That this Act shall not authorize payment to be made of any claim not presented before June 30, 1919: *And provided further*, That the Secretary of War shall report to Congress at the beginning of its next session following June 30, 1919, a detailed statement showing the nature, terms, and conditions of every such agreement and the payment or adjustment thereof: *And provided further*, That no settlement of any claim arising under any such agreement shall bar the United States Government through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed from the right of review of such settlement, nor the right of recovery of any money paid by

the Government to any party under any settlement entered into, or payment made under the provisions of this Act, if the Government has been defrauded, and the right of recovery in all such cases shall exist against the executors, administrators, heirs, successors, and assigns, of any party or parties: *And provided further*, That nothing in this Act shall be construed to relieve any officer or agent of the United States from criminal prosecution under the provisions of any statute of the United States for any fraud or criminal conduct: *And provided further*, That this Act shall in no way relieve or excuse any officer or his agent from such criminal prosecution because of any irregularity or illegality in the manner of the execution of such agreement: *And provided further*, That in all proceedings hereunder witnesses may be compelled to attend, appear, and testify, and produce books, papers and letters, or other documents; and the claim that any such testimony or evidence may tend to criminate the person giving the same shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person in the trial of any criminal proceeding.

SEC. 2. That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company, or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said Section.

*　　*　　*　　*　　*　　*　　*

Approved March 2, 1919."

No. [illegible]

In the Supreme Court of the United States

[illegible]

[illegible] Company, Appellant,

v.

[illegible]

Appeal from the [illegible]

[illegible]

In the Supreme Court of the United States

October Term, 1921.

American Smelting and Refining Company, appellant, *v.* The United States.	No. 221.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

The facts stated in the petition which are, in our judgment, relevant to the only questions raised in the case are as follows:

(1) After certain preliminary correspondence with another party, the proper authorities of the United States addressed to claimant the following letter (R. 31, 32, Ex. F):

101312—22——1

Ref. No. P. R. 2158.
Sym. P. 4219–1788 A.
File P. R.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ORDNANCE,
PROCUREMENT DIVISION,
SIXTH AND B STREETS NW.,
Washington, March 28, 1918.
M. D. W. bef.

AMERICAN SMELTING & REFINING CO.,
120 Broadway, New York City.

GENTLEMEN:

Subject: 30,000 Metric tons copper for French Government.
War Ord. P. 4219–1788 A.

1. I am directed by the Acting Chief of Ordnance to advise you that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper at a price of 23½ c. per pound net, f. o. b. New York basis.

2. Deliveries are to be completed on or before June 1, 1918.

3. Shipping instructions with reference to all shipments should be taken up with the supply division, Ordnance Department, Major Jewett.

4. It is requested that your company keep in touch with the French High Commission, as to shapes, sizes, and specifications, which they will require on this contract.

5. Inspection on the part of the French Government will be made at the refineries.

6. Payment papers are to be made out in accordance with attached instructions pertaining to shipment of raw materials and payment papers.

7. The above-mentioned copper is to be prime lake or electrolytic 99.9% pure, not less than 99.88% pure according to standard of American Society for testing materials.

8. Your acceptance of this letter is requested pending issuance of formal contract which will go forward in a few days.

Respectfully,

RAW MATERIALS SECTION,
R. P. LAMONT,
Lt. Col. Ord. N. A.
By T. S. CHALMERS,
Capt. Ord. R. C.

Attachment: (1) copy of instructions on shipments.

To this letter the claimant made the following reply (R. 34, Ex. I):

AMERICAN SMELTING & REFINING CO.,
120 BROADWAY,
New York, April 11, 1918.

Lieut. Col. R. P. LAMONT,
Procurement Division,
Raw Materials Section,
Washington, D. C.

Attention Capt. Chalmers.

DEAR SIR:

Subject: 30,000 metric tons copper for French Government.
War Ord. P. 4219, 1788 A.

We have your favor March 28th under the above reference number, and take pleasure in accepting your letter as above pending issuance of formal contract which we hope to receive in the near future.

Yours truly,

AMERICAN SMELTING & REFINING CO.,
H. M. BRUSH.

(2) The price stated in the above letter of March 28, 1918, viz, 23½ cents per pound net f. o. b. New York basis, was the same as the maximum price for copper, to governments and individuals, agreed upon, until June, 1918, by the War Industries Board and the copper producers, including claimant. (Official Bulletin, September 21, 1917, p. 1; do., January 23, 1918, p. 4.) No further agreement, however, was reached as to the price of copper until July 2, 1918, when an agreement between the War Industries Board and the copper producers (based on cost of production) was approved by the President to the following effect:

> That the maximum price on copper shall be 26 cents per pound, taking effect July 2, but subject to revision after August 15, f. o. b. cars or lighters at refinery, if shipped from eastern refineries, and f. o. b. New York if shipped from western refineries, subject to the additional charges on copper shapes approved by the price-fixing committee on June 5, 1918. (Official Bulletin, July 5, 1918, p. 4.)

(3) Immediately upon receipt of the letter of March 28, 1918, claimant began furnishing copper in accordance with the terms stated therein (R. 4). On June 1 it had delivered 10,575 tons (R. 5); on July 2, 19,609 tons (R. 5). Omitting 1,091 tons (as to which no claim is made, R. 5), there was left for shipment after July 2, 1918, 9,299 tons (R. 5).

(4) The reason for failure of claimant to deliver all of the 30,000 tons by July 2, 1918, was, either that the proper officers of the United States did not furnish, in due time, the necessary shipping directions, or that it was not possible to ship such an amount before July 2d under existing conditions. (R. 5.)

(5) After July 2, 1918, claimant continued to deliver copper until it had delivered the entire 30,000 tons called for by the order of March 28, 1918, and it was paid in full for all said copper at the price stated in said order.

(6) The United States having refused to pay more than $23\frac{1}{2}$ cents a pound for the copper delivered after July 2, 1918, the present petition was filed claiming just compensation for the copper delivered after said date, as being taken under the Government's power of eminent domain, which just compensation the petition alleges to be the maximum price agreed upon by the War Industries Board and the copper producers on July 2, 1918, as set forth in paragraph 2 above, viz, 26 cents per pound.

ARGUMENT.

(*a*) When the above facts are studied in connection with the external conditions affecting the parties and the relevant statutes referred to in Appendix No. 3 to claimant's brief, it will be perceived that the question of law involved is very simple, viz, whether the right of the claimant to compensation for the copper delivered after July 2, 1918, and the corresponding duty of the United States to make

payment therefor are governed by a conventional arrangement made by the letter of March 28, 1918, and the reply thereto of April 11, 1918, or whether such right and duty are created and imposed by law by reason of a taking of said copper after said date under the power of eminent domain. The United States maintains the former proposition, the claimant the latter.

(*b*) Before considering which one of these propositions finds the most support in the allegations of the petition and the exhibits attached thereto, certain collateral points made by claimant to demonstrate that no conventional arrangement could have been arrived at by the parties may be noticed.

1. There can be no doubt that in March, 1918, power was vested in officers of the United States to enter into an agreement as to compensation to be paid for articles purchased for the Government. Section 3709, Revised Statutes, authorizes such an agreement when public exigency requires, and there can be no dispute as to the public exigency in the matter of copper in March, 1918.

2. The fact that the agreement, if made at all, was made by letters and not in the manner or form required by section 3744, Revised Statutes, can not be taken advantage of by claimant. (*United States* v. *New York & Porto Rico S. S. Co.*, 239 U. S. 88.) Moreover, the contract was executed, so that even the United States could not have relied on section 3744, Revised Statutes. (*St. Louis Hay & Grain Co.*

v. *United States*, 191 U. S. 159; *United States* v. *Andrews*, 207 U. S. 229.)

3. There is no principle of the law of contracts which prevents the letter of March 28, 1918, and the reply thereto of April 11, 1918, from constituting a valid agreement as to the compensation to be paid for the copper delivered after July 2, 1918, merely because the parties contemplated the subsequent execution of a formal contract. Whether the parties intended the letters to be the agreement, the later formal instrument being merely a memorial thereof, or whether they intended the letters as merely preliminary negotiations to be merged subsequently in the formal contract, must be determined by the court from the facts alleged in the petition. (*Jenkins & Reynolds Co.* v. *Cement Co.*, 147 Fed. 641, 655, 658, and cases cited; *Whitted & Co.* v. *Cotton Mills*, 210 Fed. 725, 732; *United States* v. *Construction Co.*, 224 Fed. 859, 862.)

4. That the law operative at the time the letters of March 28, 1918, and April 11, 1918, were written, viz, section 120 of the national defense act of June 3, 1916, c. 134, 39 Stat. 166, 216, authorized the United States to place obligatory orders for, e. g., copper, subject to the payment of just compensation therefor, did not prevent an agreement between the parties as to what just compensation should be, both because the statute referred to expressly provided that the powers thereby conferred were in addition to the method of fixing the compensation by agreement, and because

parties may always, as a matter of course, agree as to the compensation to be paid for property taken under the power of eminent domain, instead of resorting to the courts.

(*c*) Coming to the question whether or not the facts alleged in the petition, when properly construed, show an agreement between the parties as to the compensation to be paid for all and every part of the 30,000 tons of copper, whether delivered before or after July 2, 1918, it appears that on March 14, 1918, the proper officer of the United States wrote the United Metals Selling Company that the former was prepared to procure from the latter 30,000 tons of copper at 23½ cents per pound, deliveries to extend over a period of 6 months and made at the rate of 5,000 tons per month, beginning in March. Acceptance of the letter was requested, pending the issuance of a formal contract. (R. 26, 27, Ex. A.) To this letter the United Metals Selling Company replied on March 19th, expressly stating that they could not accept an order for delivery after June 1st because the maximum price for copper had only been agreed to up to that date, and asking that the order be split up into 15,000 tons deliverable prior to June 1st at 23½ cents per pound and 15,000 tons deliverable after that date at a price to be determined. (R. 27, 28, Ex. B.) On March 23d the proper officer of the United States replied that the order would be changed, not to split orders for 15,000 tons each, but to one order for 30,000

tons deliverable before June 1st, of course at $23\frac{1}{2}$ cents per pound, and acknowledgment of the letter was requested. (R. 28, 29, Ex. C.) The requirement as to delivery of the whole 30,000 tons before June 1st was repeated and confirmed in the letter of March 25th. (R. 30, Ex. D.) Whereupon the United Metals Selling Company replied, on March 26th, making no objection whatsoever to the change in the requirement as to shipments, but requesting that the order be sent to the claimant, which had been consulted and had stated that it would fit in with its other business to handle the order. (R. 30, 31, Ex. E.) Accordingly the order was sent to the claimant on March 28th in the letter quoted above (Ex. F, R. 31), and the claimant, being fully advised, of course, as to all the previous correspondence, sent its acceptance of April 11th, quoted above. (R. 34, Ex. I.) Moreover, this acceptance was sent as the result of a letter written claimant by the Copper Producers Committee on April 10th to the effect that an acceptance of the order was necessary to complete the record and to warrant payments (R. 32, 33, Ex. G), and was accompanied by a letter from the claimant to the Copper Producers Committee, dated April 11th, in which no objection whatsoever is taken to the price or to the requirement of delivery before June 1st (though objections are taken to other details of the order), and it is specifically stated that the claimant deemed it

roper "to acknowledge the letter" (i. e., accept ie offer) "of March 28th as it stands."

If this were a case between private parties in rdinary times, it would be idle to attempt to argue hat the letters referred to did not constitute a valid greement as to the compensation to be paid for all f the 30,000 tons of copper. The parties negotiated vith each other as to the terms, and specifically as o deliveries and the price therefor, until their minds net in a clear, definite expression on all the essential erms of the agreement. It is true that a later formal ontract is referred to, but this was evidently to be nerely a memorial of the agreement, in compliance vith section 3744, Revised Statues, and was not hought of by either party as a condition to the reation of binding, contractual obligations on each.

(*d*) It is argued that, because the copper in question could have been requisitioned under the authority of section 120 of the national defense act of June 3, 1916, c. 134, and undoubtedly would have been requisitioned had the claimant refused to obey the order of March 28, 1918, therefore that order was itself a requisition under which the claimant is entitled to just compensation for the copper taken. To this there are two answers:

1. The power to requisition, conferred by the national defense act, did not supplant the ordinary method of a negotiated contract. On the contrary it was expressly declared to be merely additional to such method. The question is still left open, there-

fore, whether the facts alleged in the petition show a requisition or a contract. When examined fairly and in their entirety they not only show a negotiated contract, but are inconsistent with a requisition. Two facts are particularly significant. The United States insisted upon an acceptance of the order. This was not necessary, and therefore would not have been required, had a taking *in invitum* been intended. In addition a price was fixed, and, after objection as to applying such price to shipments after June 1st, the order was changed (and, as changed, accepted) so as to require shipments before June 1st at the price stated. If a taking, at a just compensation to be determined, were intended, the price would have been of no importance, and, therefore, would not have been the subject of negotiation and agreement. It is true that the price agreed upon was the same as the maximum fixed by the War Industries Board and the copper producers, but this fact, if material, merely puts back the agreement as to price between the United States and the claimant to an earlier period.

2. Even if the letter of March 28, 1918, be admitted to have, for some purposes, the effect of a taking under the power of eminent domain, it does not follow that it may not also be an agreement governing in all respects the compensation to be paid in any event for all the 30,000 of copper whenever delivered.

Such an agreement does not violate any rule of law. The Government may exercise its power of

eminent domain, and yet, while doing so, enter into a valid agreement with the owner of the property as to the price to be paid for it. Unless written words and actions mean nothing, that is, at the very least, what was done in the present case. Whether or not the claimant thought that its property was being requisitioned, it certainly entered into a binding agreement as to the amount of its just compensation. And this is also shown by the fact that the petition does not claim that the court shall determine the just compensation to which the claimant is entitled for the copper shipped after July 2d, but only that the maximum price, viz, 26 cents per pound, agreed upon by the War Industries Board and the copper producers on July 2, 1918, shall govern. It thus itself relies for its compensation upon an agreement, only it claims the right to substitute for a particular agreement as to a specific tonnage of copper entered into on March 28, 1918, a later general agreement as to the maximum future price of all copper.

It is this second aspect of the matter, viz, that the order of March 28, 1918, may have had, for some purposes, the effect of a requisition and yet a valid agreement have been nevertheless entered into governing in all respects the compensation to be paid for all the copper, whenever delivered, which furnishes an answer to the case relied upon by counsel for claimant, namely, *Moore* v. *Roxford Knitting Co.*, 250 Fed. 278, affirmed 265 Fed. 177, and to *Mawhinney* v. *Milbrook Woolen Mills*, 172 N. Y. Supp.

461, 188 App. Div. 971, 231 N. Y. 290 (not referred to by counsel).[1] In these cases it was held that orders (claimed by counsel to be similar to the order of March 28, 1918, in the present case) which stipulated priority over existing commercial contracts excused default on such contracts. It was not, however, held or intimated by any of the courts in these cases that the acceptance of the orders did not constitute a contract as between the Government on the one side and the producer, manufacturer, or vendor on the other. On the contrary, the opinions in these cases contain many expressions showing that the courts assumed, as without question, a contract between the parties referred to as to prices, delivery, etc.

To sum up, there may be a taking under the power of eminent domain, which involves or draws after it a contract as to the manner in which the taking shall be accomplished, and the compensation to be paid for the property taken. When this is the case, the taking may be separated or divorced from the contract and the latter will govern to the fullest extent the rights of the parties as to all matters covered by it. The present case is of this character, looked at in the aspect most favorable for the claimant. Even assuming, in spite of the language used, that the correspondence which culminated in the letter of March 18, 1918, evidenced a requisitioning of 30,000 tons of copper, it is impossible to go further and deny

[1] For somewhat similar cases in England see *Bretts Patent* v. *Smith & Co.* (1918), W. N. 157, and *Brooks Tool Co.* v. *Hydraulic Gears* (1919), W. N. 291.

that this previous correspondence, followed by claimant's letter of acceptance of April 11, 1918, constituted a definitive, valid agreement as to the shipment of the copper and the price to be paid therefor.

(*e*) Assuming then that, whether behind the transaction there stood (or lurked) a taking of property by the Government or not, there was a valid definite contract between the claimant and the United States as to the manner of taking, i. e., shipments, and the price to be paid for all the 30,000 tons of copper, the petition in its present form cannot be maintained, because it does not seek damages for breach of the contract by the United States but, repudiating the contract as to shipment of copper made after July 2d, seeks to recover for such copper a just, constitutional compensation, which compensation, however, it alleges to be the maximum price agreed upon on July 2, 1918, between the War Industries Board and the copper producers. At the outset, the petition itself relies upon the contract as stipulating for delivery of the whole 30,000 tons on or before June 1, 1918; it then alleges that only 10,575 tons were delivered prior to June 1, 1918, that between that date and July 2, 1918 (the day on which a new price for copper was agreed to), 9,034 additional tons were shipped, leaving undelivered of the 30,000 tons 9,299; but it alleges that the failure to ship all the copper prior to June 1, 1918, or July 2, 1918, was due to no fault of the claimant, but to lack of shipping orders, steamboat space and other causes beyond claimant's con-

trol. And it is from a premise built up out of these allegations that it seeks to dispense with and displace all the obligations arising from the contract in favor of an obligation to pay just compensation for all the copper which it failed to deliver as required by the contract.

Evidently such a position can not be maintained in reason or in law. We have argued above (and we now assume) that there was a valid, definitive contract between the claimant and the United States governing the delivery of all the 30,000 tons of copper and its price, which contract, looking at the matter in the light most favorable to claimant, took the place of the constitutional, just compensation (if, in fact, there was an exercise of the right of eminent domain). Whatever may be said as to the predestination of the claimant on the initial question of delivering the copper at all, there can be no possible doubt that its will was free when it came to agreeing as to the price and the deliveries, or that it voluntarily waived its right to rely upon the constitution, and voluntarily agreed as to the manner of delivery of the copper and the price therefor. Having done this, it must abide by its choice and work out its rights through the law of contracts. Whatever damages it may have suffered through breach of the contract by the United States, it is entitled to recover upon a proper showing. It can not, however (as it attempts to do in this petition), ignore the contract and recover as though the

property had been forcibly taken without any agreement whatsoever between the parties. Especially it can not (as it seems to be seeking to do) rely upon the contract as to deliveries and price of copper shipped prior to July 2, 1918, but repudiate and ignore it as to copper shipped thereafter.

(*f*) A claim is made in the brief on behalf of claimant that the petition may be treated as asking damages for breach of contract, which damages are based, necessarily, on the difference between 23½ cents per pound, the maximum price agreed upon up to June 1, 1918, and 26 cents per pound, the maximum price agreed upon July 2, 1918, for transactions after that date. This claim can not be supported. If the claimant had been a broker, buying and selling copper on the market, the difference between the market price at one time and the market price at another might be relevant on a claim for damages for preventing delivery at a certain date. The claimant, however, was a producer, or the agent of producers, and, consequently, if the petition had intended to claim damages for loss occasioned by failure of the United States to give shipping directions, it should have alleged specifically the items making up a greater cost to the claimant on the copper shipped after July 2, 1918, over the cost on the copper shipped prior to that date. The mere fact that, if the claimant had not entered into a contract for 30,000 tons at 23½ cents per ton, but, instead, had held its copper until after July 2, 1918, it might have obtained 26

cents a pound for it, can not justify a claim for damages for breach of contract based on that hypothesis. In fact, if the contract had been performed by both parties in exact accordance with its terms, and the 30,000 tons delivered prior to July 2, 1918, the claimant would have received, according to its own contention, only 23½ cents per pound for it. How, then, can it claim that because the United States prevented it from receiving the 23½ cents per pound, it is entitled, as damages for loss suffered, to 26 cents per pound? In truth the petition can not possibly be construed as one asking damages for breach of contract, and the claim to that effect in the brief is an afterthought. Furthermore, it may be noted, as a minor consideration, that the agreement of July 2, 1918, between the War Industries Board and the copper producers, did not purport to fix the maximum price of copper at 26 cents a pound as to transactions entered into, or sales made, prior to July 2, 1918, but only purported to affect prospectively contracts for copper entered into after its date.

(*g*) Some point is made in the brief on behalf of claimant to the effect that the present case is within the provisions of the Dent Act of March 2, 1919, c. 94, 40 Stat. 1272, 1273. This act, however, only applies to cases where the agreement "has not been executed in the manner prescribed by law." In the present case, a formal contract was executed in accordance with section 3744, Revised Statutes. It is true that claimant executed under protest, but

only as to the price fixed therein. That, however, only raised again the main point in the case, viz, whether or not there had been a prior informal contract covering the price; and, therefore, no additional force is given to the contention by the Dent Act, since the formal contract was sufficient to take the case out of that statute.

CONCLUSION.

The judgment of the Court of Claims should be affirmed.

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William C. Herron,
Attorney.

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of such delays and recover the difference between the new and contract prices upon the theory that the deliveries were compulsory and called for a fair compensation under the National Defense Act and the Fifth Amendment. P. 79.

(c) Damages for the Government's delay in performing, could not be had upon a petition framed on the theory of a compulsory requisition. P. 79.

(d) The case was not within the Act of March 2, 1919, c. 94, 40 Stat. 1272, authorizing relief to contractors furnishing supplies under agreements not executed in the manner provided by law. P. 79.

55 Ct. Clms. 466, affirmed.

APPEAL from a judgment of the Court of Claims dismissing appellant's petition on demurrer.

Mr. William B. King and *Mr. George A. King*, with whom *Mr. Charles Earl* and *Mr. George R. Shields* were on the brief, for appellant.

Mr. William C. Herron, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for $512,515.50, being the price of 20,500,620 pounds of copper at twenty-six cents a pound less payments received at twenty-three and a half cents. The petition was dismissed by the Court of Claims on demurrer. The facts alleged are as follows. The Government had some correspondence with the United Metals Selling Company ending in an order or proposal for 30,000 metric tons of copper for the French Government to be delivered on or before June 1, 1918. To this the Company replied on March 26, 1918, that the Copper Producers Committee had divided the handling of copper and had given the export business to the American Smelting & Refining Company. The letter requested that the order be changed to apply to the last named company and concluded "they tell us that it will quite fit in with their operations to handle this present order along

with the other shipments." Thereupon, on March 28, 1918, a letter was written by the Ordnance Department to the American Smelting & Refining Company, "to advise you that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper at a price of 23½c. per pound net, f. o. b. New York basis. Deliveries are to be completed on or before June 1, 1918"; shipping instructions to be taken up with the Supply Division, Ordnance Department; with further particulars not material and ending, "Your acceptance of this letter is requested pending issuance of formal contract which will go forward in a few days." The representative of the claimant seems to have delayed an answer in the hope of adjusting one or two details but on April 11, wrote "We have your favor March 28th . . . . and take pleasure in accepting your letter as above pending issuance of formal contract which we hope to receive in the near future." The copper except the 20,500,620 pounds, was delivered before July 2, 1918, has been paid for and no question is raised about it. But it was practically impossible to deliver this last amount until after that date and no shipping orders for it were received until a later time. It was delivered finally and the claim for the advanced price is based upon the facts and arguments that we shall state.

At the time when the order was accepted the Price-Fixing Committee of the War Industries Board, an agency of the Council of National Defence, had fixed the price of copper at 23½ cents per pound f. o. b. New York, under the Act of August 29, 1916, c. 418, § 2, 39 Stat. 619, 649, and the authority of the President. On July 2, 1918, the price was advanced to 26 cents per pound. The National Defence Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213, had authorized the President in time of war "in addition to the present authorized methods of purchase or procurement, to place an order" for material required;

made compliance with such orders obligatory under a penalty, and gave them precedence. The compensation paid was to be fair and just. The position of the claimant is that, although the language of contract was used, it was yielding to the requirements of the statute and is entitled to the fair price that the statute promised. The fair price, it contends, for copper delivered after the change of July 2, is twenty-six cents, because the delay is alleged to have been due to the failure of the Government to send shipping orders and to the fact that further deliveries were made impossible for the time by the Government's appropriating all the copper available to other uses. It also argues that there was no valid contract, since the agreement was not made by advertising and was not within the exception when the public exigencies require immediate delivery. Rev. Stats., § 3709.

We may lay the latter objection on one side. There can be no question that the war created a public exigency and it would be going far to deny that the contract was for a delivery as immediate as was practicable for the subject-matter. Moreover the statutory requirements were for the protection of the United States, not of the seller. *United States* v. *New York & Porto Rico S. S. Co.,* 239 U. S. 88. Of course the expressed contemplation of a more formal document did not prevent the letters from having the effect that otherwise they would have had. The only serious argument is the supposed duress. But that can not prevail. It may be true that the claimant was yielding to the statute in a general way and did not discriminate between what it was required to yield and what it could reserve. But if it had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary so far as appears was willing to contract and was content in the main with what was offered. As was pointed out by the Court of Claims, the acceptance was sent because

the claimant was advised by the Government that no payment could be made until the claimant had accepted in writing the Government's proposal, whereas no acceptance was necessary if the order was a compulsory requisition. We are of opinion that the claimant must stand upon the letters of March 28 and April 11.

The claimant argues that under its contract it was set free by the delay in shipping orders, and that although it did not refuse to proceed on that account, the omission should be credited to patriotism not to a waiver of legal rights. But whatever the motives for its conduct the claimant kept the contract on foot. It even is said to have requested to be allowed to continue deliveries after June 1. Its claim if any must be for damages on the ground that the United States did not perform its part of the contract on time. Such a claim is not necessarily waived by completing performance. *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159, 164. But the petition is framed on the theory that there was no contract but a requisition under the above mentioned Act of June 3, 1916, c. 134, § 120, and that the claimant is entitled to just compensation by that section and by the Fifth Amendment to the Constitution. This we hold to be a mistake. Whether any claim for damages could be urged is not before us; the petition discloses grounds for doubt at least. Our judgment excludes any remedy under the Act of March 2, 1919, c. 94, 40 Stat. 1272, providing for supplies and services furnished under agreements not executed in the manner prescribed by law. We have said nothing about repeated requests that the claimant should sign a formal contract, its refusals, and its ultimate signing under protest, because these facts in no way modify the relation of the parties under the contract by letters already made.

Judgment affirmed.

AMERICAN SMELTING AND REFINING COMPANY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 221. Argued April 25, 1922.—Decided May 15, 1922.

1. A contract made during war for war material to be delivered by a specified date, which was as early as delivery would be practicable under the circumstances, is within the exception of Rev. Stats., § 3709, dispensing with advertising for purchases when public exigencies require immediate delivery. P. 78.
2. The formalities of Rev. Stats. § 3709, are to protect the United States, not the seller. P. 78.
3. The fact that an offer and an acceptance by correspondence are both made in express contemplation of a more formal document to follow does not prevent their constituting a contract. P. 78.
4. At a time when a price for copper to the Government had been fixed under Act of August 29, 1916, c. 418, § 2, 39 Stat. 649, claimant received from the War Department a proposal in writing for delivery of a stated amount at that price before a certain date under shipping orders to be supplied by the Department and accepted it in writing at the Department's request and upon its advice that no payment could be made without such acceptance. *Held:*

(a) A contract, and not a requisition under the National Defense Act of June 3, 1916, c. 134, § 120, 39 Stat. 213, which authorized, in addition to purchase, the obtaining of material by compulsory orders, for a fair and just compensation. P. 78.

(b) The claimant, having completed deliveries after alleged delays in shipping orders and after the government price had been increased under the Act of August 29, 1916, *supra*, could not, in respect of such deliveries, claim freedom from the contract because